TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 104.

GEORGE D. ROGERS, A. L. GOETZMAN, AND F. E. CRANDALL, REPRESENTING THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS IN ERROR,

vs.

THE COUNTY OF HENNEPIN ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED MARCH 16, 1914.

(24,111)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 24, 1915.

1-50 STATE OF MINNESOTA:

Supreme Court, General October Term, A. D. 1913.

Friday morning, 9:30 o'clock, December 12, A. D. 1913, Court convened pursuant to adjournment.

Reg. No. 18394. Cal. No. 250.

GEORGE D. ROGERS et al., Appellants,
vs.
COUNTY OF HENNEPIN et al., Respondents.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement.

A true record.

Attest:

I. A. CASWELL, *Clerk*.

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk*,
By —— ——, *Deputy*.

Filed Feb. 4, 1914. I. A. Caswell, Clerk.

51 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1913.

No. 250.

GEORGE D. ROGERS, A. L. GOETZMAN, and F. E. CRANDALL,
Appellants,
vs.
COUNTY OF HENNEPIN, HENRY C. HANKE, as County Treasurer and Individually, and Al P. Erickson, as County Auditor and Individually, Respondents.

Appeal from District Court, Fourth Judicial District, County of Hennepin.

This cause having been duly argued and submitted at the General October Term of this court A. D. 1913 upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the Court below, herein appealed from, be and the same hereby is, in all things affirmed and that judgment be entered accordingly.

Entered February 4, A. D. 1914.

By the Court,

Attest:

I. A. CASWELL, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk.*

Filed Feb. 4, 1914. I. A. Caswell, Clerk.

52 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1913.

No. 250.

GEORGE D. ROGERS, A. L. GOETZMAN, and F. E. CRANDALL, Appellants,

vs.

COUNTY OF HENNEPIN, HENRY C. HANKE, as County Treasurer and Individually, and Al P. Erickson, as County Auditor and Individually, Respondents.

Pursuant to an order of Court duly made and entered in this cause February 4, A. D. 1914, it is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court of the Fourth Judicial District, sitting within and for the County of Hennepin be and the same hereby is in all things affirmed.

And it is further determined and adjudged that the Respondents above named, do have and recover of said Appellants herein the sum and amount of Forty-nine and 50/100 dollars, ($49.50) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed February 4, A. D. 1914.

By the Court.

Attest:

I. A. CASWELL, *Clerk.*

Statement for Judgment.

Statutory Costs, $25.00; Printer, $12.50; Clerk, $12.00; Acknowledgments, $—; Return, $—; Postage and Express, $—; Filing Mandate, $—; Total, $49.50.

53 State of Minnesota, Supreme Court. Transcript of Judgment. Filed Feb. 4, 1914. I. A. Caswell, Clerk.

STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, February 4, A. D. 1914.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk.*

54 18394. State of Minnesota. Supreme Court. George D. Rogers, et al., Appellants, against County of Hennepin, et al., Respondents. Judgment Roll. Filed Feb. 4, 1914. I. A. Caswell, Clerk.

55 STATE OF MINNESOTA:

Supreme Court, October Term, 1913.

GEORGE D. ROGERS (and as Amended), A. L. GOETZMAN and F. E. CRANDALL, Appellants,

vs.

COUNTY OF HENNEPIN, HENRY C. HANKE, as Its County Treasurer and Individually, and AL. P. Erickson, as County Auditor of said County and Individually, Respondents.

Assignment of Errors.

The plaintiff assigns that the trial court and the state erred:

1. In holding that any of the memberships assessed herein were assessable property. (Folio Paper Book 21-22, 39-42, 48-49.)

56 2. In ordering and adjudging that the plaintiffs were not entitled to the temporary injunction herein, and in discharging the restraining orders. (F. P. B. 39-42.)

3. In holding that the complaint did not state a cause of action. (F. P. B. 39-42, 48-49.)

4. In holding that the assessment here in question was not a double assessment, if said memberships represented property, except to the extent of $678.61. (F. P. B. 25-27, 39-42, 48-49.)

5. In holding that the memberships herein are property within the meaning of the Minnesota taxing statute. (F. P. B. 11-28, 39-42, 48-49.)

6. In holding that the memberships herein represented property at all, and especially above the physical assets already fully taxed. (F. P. B. 22, 39-42, 48-49.)

7. In holding that these memberships were either "money" or "credits." (F. P. B. 24, 39-42, 48-49.)

8. In ordering and adjudging that the plaintiff Goetzman, and the class represented by him, were subject to taxation on their memberships in Minneapolis, they being non-residents of the State of Minnesota. (F. P. B. 30-31, 39-42, 48-49.)

9. In ordering and adjudging that the plaintiff Crandall and those represented by him, are subject to taxation upon their memberships, said parties being non-residents of the city of Minneapolis, where the assessment was made. (F. P. B. 30-31, 39-42, 48-49.)

57 10. In holding that it was not a discrimination under the amendment of 1906, Section 1 of Article 9 of the constitution of Minnesota to assess these memberships and refuse to assess memberships in the Associated Press, lodges, fraternal orders, churches, etc., and all others of the same class. (F. P. B. 22-25, 39-42, 48-49.)

11. In holding that the assessments herein did not deny to the several members in the respective classes the equal protection of the laws contrary to both the state and federal constitutions. (F. P. B. 25, 39-42, 48-49.)

12. In refusing to hold that the assessment of said memberships as personal obligations was a taking of the property of the said respective members without due process of law, and without compensation, and contrary to both the state and federal constitutions. (F. P. B. 25, 39-42, 48-49.)

13. In holding that the assessment of the memberships located outside of the city of Minneapolis, County of Hennepin, and placing a personal obligation upon the members, was within the jurisdiction of the taxing officers of Minneapolis, and thereby depriving the said respective members of their property without due process of law. (F. P. B. 31, 39-42, 48-49.)

14. In holding that the assessment of the memberships owned by non-residents of the state of Minnesota, and located outside of Minneapolis, were not beyond the jurisdiction of the taxing officials of the city of Minneapolis, and the taking of property without due process of law. (F. P. B. 31, 39-42, 48-49.)

MERCER, SWAN & STINCHFIELD,
Attorneys for Appellant.

Filed Nov. 22, 1913. I. A. Caswell, Clerk.

58 *Statement of Facts.*

This action was originally brought by Col. Rogers against the county officials to cancel all assessments of membership in the Chamber of Commerce and to restrain their enforcement (P. B. F. 33), upon the theory of testing the question of whether they were taxable and thus preventing 550 otherwise necessary defenses (Fol. 28). A restraining order was obtained (Fol. 6); a demurrer interposed to the complaint (Fol. 37); the motion for a temporary injunction and the trial of the demurrer were heard together (Fol. 39); the court dissolved the restraining order, denied the temporary injunction, and sustained the demurrer (Fol. 40-41).

There was then some question in the minds of counsel as to whether this sole plaintiff was truly representative of each of the three classes of members, and to settle that, the amendments were made to add the other two defendants, as representing the state members outside of Minneapolis (Fol. 30), and the non-resident members living in other states (Fol. 30), respectively the court approved the amendment and left the order standing.

The complaint was drawn with a view of fairly setting
59 forth the facts to reach the question by demurrer (Fol. —); after the demurrer was sustained a motion for judgment was granted (Fol. 46); the judgment was entered against the plaintiffs that they take nothing by the action, and that costs be granted the defendants (Fol. 47), and it was so entered (Fol. 19).

Thus we have a judgment upon the merits that no cause of action exists on the facts admitted by the demurrer. In short, those facts are:

(1) That the Chamber is a corporation in the nature of a voluntary association (Fol. 10):

"Similar in principle, organization, conduct, control, and relations among its members, to the relations of membership and control in churches, social clubs, fraternal societies, the Associated Press and voluntary business associations generally."

(2) That it has no capital stock; transacts no business for profit; that it owns buildings to rent for offices to its members; and controls the relations of its members in their dealings on its grain exchange (Fol. 11).

(3) That its members transact business for themselves and their customers and not for it, (Fol. 12); that no use for profit is made of the membership except by the member (Fol. 18):

(4) That the memberships are subordinate to its rules and regulations for admission, control, liens, penalties, agreement to abide by the rules, agreement to give up many of his legal rights in operating upon the floor, and only acquired membership sub-
60 ject to the will of the members generally, and to such rules and regulations as they, or a majority of them, prescribe (Fol. 15);

(5) That a membership certificate is issued to better regulate admission, control and disposition of the memberships; that to get

a membership the mmber must not only be elected, but he must agree to be bound by the Charter, Rules, Regulations and Customs, as conditions precedent to the sale and transfer of the membership to him; that when a membership applicant passes all these qualifications, and not until then, he gets a certificate which he can only transfer by the same processes and on the same conditions (Fol. 17);

(6) That when the assessment was made the memberships were selling at $3,500.00 (Fols. 20 and 22):

"that said value was entirely a contingent one and conditioned upon the rules and regulations for acquisition, control and disposal as above set forth, and did not represent property that could be acquired, controlled or disposed of except with the consent and subject to the regulations of said association outside of legal obligations."

(7) That if they had been unqualifiedly worth $3,500, and the memberships above the proportionate value of the assets which were fully taxed had been assessed, they would have been $678.61 each (Fol. 21);

(8) That they do not represent ownership, except as the memberships in the other enumerated associations do (Fol. 18);

61 (9) That the assets of the Chamber were all fully taxed (Fol. 18);

(10) That the members were each assessed as "moneys and credits" as if property in the general sense and as if the corporation had not been taxed (Fol. 25):

"that the membership in the Associated Press, lodges, fraternal orders, churches, etc., were not taxed in said city, although standing in a similar position; and a discrimination was thereby made, not only unlawfully, but prejudicially as against this plaintiff and the other five hundred forty-nine (549) members of said association by unequally assessing them and taking their property without due process of law, contrary to the state and federal constitutions."

11. That appearance was duly made before the Boards of Equalization to cancel said taxes, or, failing in that, to reduce the taxes to $678.61; that those Boards were inclined to grant the application, apparently, but upon taking legal advice in each instance, were advised that the courts should be asked to determine whether this was taxable property (Fol. 27).

12. That the county was threatening to enforce these taxes against the individuals and 550 defenses would be required, which would make an unnecessary multiplicity of litigation for the city, county and state as well as the parties (Fols. 28-29).

13. That the plaintiff Crandall is a resident of Mankato, Blue Earth County, and joins in the bill on behalf of himself and

62 all other members residing in the state outside of Minneapolis at the locations given, and compose in all fifty eight (58); that the plaintiff Goetzmann is a resident and citizen of Wisconsin and joins for himself and all other members who are non-

residents of Minnesota, of which there are fifty (50); that the certificates of memberships are kept at their respective residences, and the non-resident memberships are not operated, except in rare instances in the state of Minnesota, but are confined to the benefits which the members get by having other members buy or sell grain for them, at one-half of what the regular commission to outsiders would be (Fol. 32).

14. The following applicable things appear in the legal history of the state:

Chapter 138 of the General Laws of Minnesota, 1883, under which the Chamber exists, provides:

"It may prescribe the terms and conditions of its membership, the mode of admission of members. * * *"

This law provides for the sort of a private institution which has grown up.

This act also provides that:

"whenever by it deemed necessary, may raise money for the purposes of the corporation by assessments upon the members thereof; and the payment of such assessments may be enforced by a sale or forfeiture of the membership of any member failing to pay the same, in such manner as the by-laws or rules may provide; but the aggregate of all assessments made in any one (1) year, shall
63 not exceed the sum of one hundred dollars ($100) upon each member, unless a majority of the members of the corporation shall vote in favor of such extra assessment."

It is also provided by this act that:

"Said corporation may inflict fines upon any of its members, and collect the same, for breach of its rules, regulations or by-laws; said fines may be collected by action of debts before a justice of the peace, or in any court of record having jurisdiction of the amount of the fine, in the name of the corporation, or by temporary suspension or permanent removal from membership, or removal from office therein."

Indeed, in the case of Evans vs. Chamber of Commerce, 86 Minnesota, 448, being an action against this very association, this court laid down the rule that these memberships were subject to self-imposed conditions and were not property in the general sense, saying:

"Clearly, under these statutory provisions, the association had the right to make membership conditional upon a submission to arbitration of business disputes arising between its members, and the rules in question went no farther than this."

The court points out that this membership was gotten upon these conditions and that "as expressed in some of the cases, such a membership is 'clogged with conditions,'" and then says, at page 453:

"This is nothing new or novel, for such conditions are annexed to membership in many societies or associations, social, fraternal
64 and religious. In these organizations, as well as in defendant association, membership subject to conditions is optional, not compulsory. All members became such voluntarily, stipulating, to

conform to the by-laws or to submit to expulsion, which is nothing but a self-inflicted exclusion from membership rights and privileges."

The scheme of organization here is not that of a general corporation, but in the nature of an association, based upon personal privileges as distinguished from property interests and rights. Consequently, a membership is not property in the general sense; it lacks the element of the right of admission, the right of use, and the right of transfer, subject only to the laws of the land, as is usual in property. This is not, as this court has said, "new or novel," but is in accordance with Chapter 37 of the General Laws of 1881, under which the Chamber of Commerce was organized. That statute provides, among the powers of incorporation, that it

"may by resolution or by-law prescribe the terms and conditions of membership in and the mode of admitting members;"

This, of itself, shows that the memberships are made upon terms and conditions, and that they are not intended by the statute to be sold or transferred, except according to terms and conditions. This statute must be taken in connection with the history of the subject, and the nature of the organization under which it was
65 made, not only in this state, but in other states.

In the case of McCarthy Bros. v. Chamber of Commerce, 105 Minnesota 497, this court, speaking through Mr. Justice Elliott, said:

"In pursuance of its statutory and inherent powers to make proper rules and regulations for its government and operation (Evans v. Chamber of Commerce, of Minneapolis, 86 Minnesota 148, 91 N. W. 8), the chamber adopted the rule which we have quoted, which enables business firms and corporations to acquire membership for the purposes therein stated. In no other way can a corporation become a member of the chamber. As said of a similar co-organization in American v. Chicago, 143 Ill. 210, 32 N. E. 274, 18 L. R. A. 190, 36 Am. St. 385, it had 'an undoubted right to adopt this rule, and as it prescribes the mode and the only mode in which membership in the exchange can be obtained, no one can justly claim to be a member who has not been admitted in the mode thus prescribed.'"

There is no right of collateral or outside purchase recognized by this chamber.

In short, the Chamber pays full taxes upon everything which it owns; there is no capital stock; the state assesses these memberships upon the theory that they represent this property already once fully taxed, and that they also represent privileges of an intangible nature none of which can be possessed, used or conveyed or given away as would be essential to the rights of property, but they are singled out of this general class arbitrarily, and taxed while other similar memberships in other associations go free.

MERCER, SWAN & STINCHFIELD,
Attorneys for Appellant.

Filed Nov. 22, 1913. I. A. Caswell, Clerk.

66 18394.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1913.

No. 250.

GEORGE D. ROGERS et al., Appellants,
v.
COUNTY OF HENNEPIN et al., Respondents.

PER CURIAM:

This action was brought to cancel all assessments of taxes on memberships in the Minneapolis Chamber of Commerce and to restrain their enforcement. The trial court sustained a demurrer to the complaint, and denied a temporary injunction. A motion by defendants for judgment was granted and judgment was entered in favor of defendants. Plaintiffs appealed from this judgment.

The case was submitted on briefs in this court with State v. McPhail. The decision in that case, filed herewith, controls this.

Judgment affirmed.

Filed January 23, 1914. I. A. Caswell, Clerk.

67 18478.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1913.

No. 28.

In re Personal Property Tax Proceedings in St. Louis Co., 1912.

STATE OF MINNESOTA, Respondent,
v.
S. A. MCPHAIL, Appellant.

Syllabus.

1. A membership in the Duluth Board of Trade is property.

2. It is property which the legislature, under the constitution of the State, might by appropriate laws tax.

3. R. L. 1905, Sec. 794, providing that all real and personal property in this state and all personal property of persons residing therein, except exempt property, is taxable, means that all personal property of whatever nature not exempt from taxation shall pay taxes. Under this section a membership in the Duluth Board of Trade was properly taxed as personal property of the member.

4. R. L. Sec. 797, providing that "Personal property shall be construed to include"; and naming eleven classes of property, does not exempt from taxation or render not subject to taxation personal property not included within any of the classes named.

5. There has been no such settled construction of the statutes referred to as to justify the application here of the doctrine of practical construction.

6. The taxation of such a membership does not violate any provision of the Federal or State constitution.

Order affirmed.

68 18478.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1913.

No. 28.

In Personal Property Tax Proceedings in St. Louis County, 1912.

STATE OF MINNESOTA, Respondent,
v.
S. A. McPHAIL, Appellant.

Opinion.

Defendant on May 1, 1911, was the owner of one membership in the Duluth Board of Trade. The assessor of the city of Duluth on May 1, 1911, assessed this membership at the sum of $500; $100 was allowed defendant as an exemption, leaving a total assessment of $400. Defendant protested against the assessment of such membership to the assessor, the Board of Equalization, and the Board of Review. In these proceedings to enforce the collection of personal property taxes for 1911, defendant answered the citation served upon him, and the issues were tried by the court. Its decision was that the membership was personal property subject to taxation, and properly taxed under the laws of this State. Defendant moved for a new trial. The motion was denied, and this appeal taken from the order.

1. The question at the threshold is whether a membership in the Duluth Board of Trade is personal property.

The general nature of the business of the Duluth Board of Trade is to establish and maintain uniformity in commercial usages; to enforce proper conduct in trade; to adjust controversies and disputes among its members; to acquire and disseminate valuable business information, and to furnish a commercial exchange at Duluth, Minnesota, in the furtherance of its business pursuits. The Board of Trade has no capital stock. It has a membership of two hundred, and a certificate of membership is issued to each member. It does not engage in the grain business for profit, but furnishes

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facilities and conveniences for the transaction of the grain business by its members. It owns and maintains a building and trading room, and furnishes to its members telegraphic and other information as to matters important in the grain trade; it keeps a record of actual transactions upon the Board, provides means for arbitrating and settling differences, and does such things as facilitate trading in grain in the same general way as do the various exchanges and boards of trade throughout the country; its members are required to pay annual dues.

Membership in the Board of Trade can only be transferred upon certain conditions expressed in the articles of incorporation, rules and by-laws, all of which regulations are intended to prevent men of unfit business character and standing to become members of the board; but such memberships are bought and sold, and have a recognized fluctuating value from time to time and are used as collateral at the banks, and are valued by the Board of Trade in fixing the assets of one of its members. On May 1, 1911, a membership was of the value of from $3,000 to $3,500, and at times prior and after that date, the value ranged from $3,000 to $4,800. On May 1, 1911, the Duluth Board of Trade owned real, and tangible personal property of the value of $450,000 to $500,000, and taxes were assessed and paid thereon.

We hold that a Board of Trade membership is property.
70 We adopt as a part of this opinion the following succinct analysis of the question in the memorandum of the trial court: "There is no difficulty in holding that a membership in the Board of Trade is property. It confers a right to do particular business in a particular and advantageous way. It brings the holder in contact with men with whom he may deal. The right to trade upon the floor of the Board is substantially essential to the conduct of the grain buying and selling business. A membership has a use value and a buying and selling or market value. It is bought and sold. Its value is considered by the Board of Trade in determining the assets of a member. There is a lien upon it for balances due members. It is used as collateral at the banks. It passes by will or descent and by insolvency or bankruptcy. A few memberships represent in actual cash value more than the life-time savings of an ordinary active and thrifty man. It is true that there are certain restrictions in the ownership and use of a membership. These may increase or decrease its value, probably in the case of a board of trade membership greatly enhance it. They do not prevent its being property."

The authorities support this view. Hyde v. Woods, 94 U. S. 523, in which Mr. Justice Miller said there could be no doubt that a membership in the San Francisco Stock and Exchange Board was property. Sparhawk v. Yerkes, 142 U. S. 1, (seat in New York Stock Exchange); Page v. Edmunds, 187 U. S. 596, (membership in Philadelphia Stock Exchange). In these cases it is held that such a membership is property which passes to the trustee in bankruptcy of the member's estate, because it could be "transferred" by the member, was of decided value, and could be sold subject to election

by the exchange. "While the property is peculiar and in its
71 nature a personal privilege, yet such value as it may possess, notwithstanding the restrictions to which it is subject, is susceptible of being realized by creditors." Sparhawk v. Yerkes, supra. In Powell v. Waldron, 89 N. Y. 328, it was held that a seat in the New York Cotton Exchange was property, and as such passed to a receiver in supplementary proceedings on execution against the owner. In Platt v. Jones, 96 N. Y. 24, a seat in the New York Stock Exchange was held property which passed to the owner's assignee in bankruptcy. In the Matter of Hellman, 174 N. Y. 254, it was held that a seat in the New York Stock Exchange is property subject to the inheritance transfer tax prescribed by a law of the State which defined the words "estate" and "property", as used in the law, as including "all property or interest therein situated within or without the State." Further cases to the same effect are: Odell v. Boyden, 150 Fed. 731; In re Currie, 185 Fed. 263; Nashua Savings Bank v. Abbott, 181 Mass. 531. That such a membership is a species of property is recognized by decisions of this Court. State v. Chamber of Commerce, 77 Minn. 308; Evans v. Chamber of Commerce, 86 Minn. 448; McCarthy v. Chamber of Commerce, 105 Minn. 497.

Defendant points to the definitions of the word "property" in the dictionaries, law dictionaries, and decided cases, and insists that the right to alienate or transfer is an essential incident to property. As has been shown, there is a right to transfer a Board of Trade of membership, though such right is subject to the right of the Board to disapprove the sale. It is true that the right to dispose of the membership, as well as the right of the member to retain it and use it,
72 is subject to the rules of the board; as expressed in Evans v. Chamber of Commerce, supra, "clogged with conditions". But that the membership is still "property", we think is true. Whether it is property that is taxable under the laws of the State, is another question and will be treated separately. Defendant calls a membership in the Board of Trade a mere personal privilage, and compares it to a membership in a social club, or church. The distinction is we think obvious. And the same is true of the reputation of a lawyer, physician or banker. All these things have a value to the owner, but there is nothing tangible that he may sell for a consideration, put up as collateral, or which may be reached by his creditors. But a membership and seat in a Chamber of Commerce, Board of Trade, or Stock Exchange, not only is often of great value, and may be alienated by the owner, but under the decisions cited, may be reached by his creditors. It may be pledged as collateral, and passed by will or descent. As stated by the trial court and in some of the decisions, the fact that there are restrictions upon the ownership and transfer, bears more upon the question of value, than it does upon the question whether the membership is property.

2. And we think that such a membership is personal property of a character that is properly taxable. That is, that the legislature, under the provisions of the constitution, has the power to tax property of this character. The constitution of the State, at the time of the enactment of the laws hereinafter considered, provided that "laws

shall be passed taxing * * * all real and personal property, according to its true value in money." That this provision granted the legislature the power to enact laws taxing such property as a membership in a Board of Trade or Stock Exchange is fairly
73 clear from the consideration of the nature of such a membership, and the language of the constitution. Indeed, not only was the power granted, but a duty to enact such laws was imposed.

3. The constitutional provisions are not however self executing. It was necessary for the legislature to exercise the power given and to perform the duty imposed, by passing laws. The question then is whether our statutes providing for the taxation of property include and cover property of the character of a membership in a Board of Trade or Chamber of Commerce.

The provision requiring the legislature to pass laws taxing all real and personal property existed in the constitution at the time of its adoption and until the amendment of 1906. While Minnesota was still a territory, it had a statute providing that all property, real and personal, not expressly exempted, should be subject to taxation. R. S. 1851, Ch. 12, Sec. 1; Statutes 1849-1858, Ch. 9, Sec. 1. In the revision of 1866, it is declared that "all property, whether real or personal, in this State * * * is subject to taxation." Substantially the same provision has continuously been in our statutes and is there at the present time. G. S. 1878, Ch. 11, Sec. 1; G. S. 1894, Sec. 1508; R. L. 1905, Sec. 794; G. S. 1913, Sec. 1969. Under Sec. 794, R. L. 1905, which provides that "all real and personal property in this State, and all personal property of persons residing therein, * * * is taxable, except such as is by law exempt from taxation," there would be little if any difficulty in holding that a Board of Trade membership, being personal property of a character
74 which might be made subject to taxation, and not exempted from taxation, was included in the words "all personal property." Were it not for section 797, it would be clear that the assessment and levy by the proper officers of a tax on such a membership would be justified.

Section 797 names eleven specific classes of personal property, in no one of which is by name included Board of Trade memberships. So far as here material, its language is as follows: "Personal property shall be construed to include:

1. All goods, chattels, monies and effects." Then follow ten other particular classes of property.

Section 835 provides that the assessor shall fix the value of items of personal property under thirty heads, the last of which is "The value of all other articles of personal property not included in the preceding items."

We think it should not be held that section 797 was intended to describe all personal property that was subject to taxation. The language of the section does not compel such a conclusion. "Shall be construed to include" does not necessarily mean "shall only include." The section was not intended to be restrictive, but rather to help define what was meant by "all personal property" as that term is used in section 794. This view is greatly strengthened by

the unquestioned fact that it is the settled policy of the State, as expressed in its constitution, statutes, and decisions, that all property within the State shall be taxed, unless exempt. Commissioners of Rice County v. Citizens' Nat. Bank, 23 Minn. 286; State v. Jones, 24 Minn. 251; County of Olmstead v. Barber, 31 Minn. 26; In re Jefferson, 35 Minn. 219; State v. Stearnes, 72 Minn. 222. In the Rice County case, decided in 1877, in referring to section 1,
75 Ch. 1, Laws 1874, which provides that "all real property in this State, and all personal property of persons residing therein, * * * is subject to taxation," the Court said; "The evident purpose of this section was to declare in general terms, that all property, both real and personal, within the jurisdiction of the Court, unless otherwise exempted, should be subject to taxation." In State v. Jones, where it was decided that a certain debt was property and subject to taxation, Chief Justice Gilfillan said: "This debt was property, and it was the intention both of the Constitution and Statute that all property, unless expressly exempted, should be taxed." At the time these and the other decisions were rendered, there were in force statutory provisions similar to Section 797. Laws 1874, Ch. 1, Section 3, provided that "personal property shall, for the purposes of taxation, be construed to include" certain described classes of property, and the same provision was contained in Ch. 1, section 3, Laws 1878, in Chap. 11, Sec. 3, G. S. 1878 and in Sec. 1510, G. S. 1894. In no case has it been considered that these provisions amounted to a declaration that no property was to be taxed that was not covered by the classes. It would have been a breach on the part of the legislature of a duty imposed by the constitution to omit from taxation property that was not exempt, and we certainly should not find such a breach unless the statute is fairly open to no other construction.

Section 835, before quoted, defines what the statement of the property owner shall contain. He is required to list, and the assessor to fix the value of, "all other articles of personal property not included in the preceding items." In State v. Western Union
76 Telegraph Co., 96 Minn. 13, this omnibus clause was said to be adequate for the taxation of the property of foreign corporations as a system. We are of the opinion that when the legislature declared that all personal property should be taxed, all that follows in the succeeding sections by the way of classifying property, defining how it shall be listed, assessed and taxed, is for the purpose of making it easier for the assessing officers to do their work, and attempting to advise the property owner as to his duties. The following language from Justice Jaggard's opinion in the Western Union case is pertinent at this point: "It is true that the taxing authorities of this state have failed to avail themselves of this means for properly increasing public revenue; but a privilege of exemption is not, therefore, to be based upon such official dereliction. It is an obvious rule that a revenue statute should be construed upon the assumption that a legislature would make no discrimination, and would not attempt to provide for the collection of taxes on one kind of property without making provision for the collection of taxes on all other property equally subject to taxation."

We hold that section 797 was not intended to contain a statement

of all personal property subject to taxation, and that the fact that Board of Trade memberships do not come under any of the eleven classes does not mean that they are not to be taxed.

It is confidently asserted by defendant that the authorities in other states are uniform to the effect that a seat or membership in a Board of Trade or Stock Exchange cannot be taxed. This is not quite true, as we shall point out, but it is not to be denied that
77 in every case that has arisen in this country directly involving the question, the membership has escaped taxation. Mayor, etc. of Baltimore v. Johnson, 96 Md. 737; Thompson v. Adams, 93 Pa. St. 55; San Francisco v. Anderson, 103 Cal. 69; People v. Feitner, 167 N. Y. 1. In the Maryland case, it does not appear that there was a statute declaring that all personal property was subject to taxation. The court recognized that a membership in the Baltimore Stock Exchange was in a certain sense property, but held that the legislature had not expressed an intention to tax such property, and had made no provisions as to how such property should be taxed. The Pennsylvania and California cases proceed on the ground that such a membership is not property, but a mere personal privilege. This ground is unsound, as we have already held in this opinion. The New York case, People v. Feitner, held that an exchange membership was property, but was not taxable because the legislature had not enacted a statute that covered such property. The New York statute is quite similar to ours, and the decision would be good authority but for the subsequent case of In the Matter of Hellman, 174 N. Y. 254. The Hellman case, while not overruling People v. Feitner, seems to us inconsistent with that decision. Under a statute prescribing an inheritance or "transfer" tax, it was provided that a certain tax should be imposed on the transfer of any real or personal property by will or descent. By a section of the act, the words "estate" and "property" as used in the law, were defined as including "all property or interest therein, whether situated within or without this State." It was held that a seat in the New York Stock Exchange was property, and subject to the tax. Referring to People v. Feitner, the Court said: "We did not question this proposition," (that such a seat was property) "but
78 our decision proceeded on the ground that the seat did not fall within what Judge Vann terms 'the somewhat restricted definition of the tax laws.'" We are unable to see any real distinction between an inheritance tax imposed upon "all property" and the provision of our statute that "all property" is subject to taxation. The Hellman case and the statement of Justice Lurton in O'Dell v. Boyden, 150 Fed. 731, that such a membership is "descendable, taxable and assignable," constitute our reason for saying that the statement that the authorities are unanimous against the taxation of such a membership, is not quite true.

As to the cases cited holding that an associated Press franchise, a bank franchise, good will of a newspaper, ground rent under a lease, were not taxable under the various statutes of the states in which the decisions were made, it is sufficient to say that they are not particularly in point. In the case of State v. Western Union

Telegraph Co., this Court took a position that seems to render these cases out of line with the law in this State.

4. We attach little weight to the argument of practical construction. The evidence shows no such settled construction of the statute as to warrant us in applying the doctrine here.

5. We do not sustain the claims that the taxation of memberships in a Board of Trade or Stock Exchange, would violate provisions of the Federal or State constitution. It is argued that such taxation would be class legislation, and violate the equality clause in the Minnesota constitution, because the privileges enjoyed by members of social clubs, commercial clubs, golf clubs, secret and church societies, are not subject to taxation. We see no improper classification here, nor any lack of equality or uniformity.

79 Nor would it be double taxation. The members of the Board are not required to pay taxes on the physical and tangible property of the Board, nor does the Board pay taxes upon the intangible rights which constitute the value of a membership.

And we hold that proceedings to tax such a membership do not deprive the member of his property without due process of law, take property for public use without just compensation, or deny such member the equal protection of the laws, in violation of familiar provisions of the Federal constitution and amendments.

Our conclusion, after a careful consideration of the arguments and briefs in this case and in the case of Rogers v. County of Hennepin, the decision in which is filed herewith, is that the trial court properly rendered judgment against defendant for the tax assessed against his membership in the Duluth Board of Trade.

Order affirmed.

BUNN, *J.*

Filed January 23, 1914. I. A. Caswell, Clerk.

80 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the opinion and syllabus in the case of State v. McPhail, to which decision the Court refers as controlling in the Per Curiam decision in the case of George D. Rogers, et al., Appellants, vs. County of Hennepin, et al., Respondents, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, February 25, 1914.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk.*

81 *Authentication of Record.*

SUPREME COURT,
State of Minnesota, ss:

I, I. A. Caswell, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of George D. Rogers, et al. versus County of Hennepin, et al., and also of the assignment of errors, statement of facts, and the opinion of the Court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in St. Paul, Minnesota, this February 25, 1914.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

82 STATE OF MINNESOTA:

Supreme Court.

GEORGE D. ROGERS, A. L. GOETZMAN, and F. E. CRANDALL, Representing Themselves and Others Similarly Situated, Plaintiffs-Appellants,

vs.

COUNTY OF HENNEPIN, HENRY C. HANKE, as Its County Treasurer and Individually, and AL P. ERICKSON, as County Auditor and Individually, Defendants-Respondents.

Assignments of Error by Appellants, George D. Rogers, A. L. Goetzman and F. E. Crandall, representing themselves and others similarly situated, Plaintiffs in Error, Presented and Filed with the Petition for Writ of Error from the United States Supreme Court to the Supreme Court of the State of Minnesota.

The said petitioners, plaintiffs in error, for writ of error from the Supreme Court of the United States to the Supreme Court of the State of Minnesota in the above entitled proceedings, by Mercer, Swan & Stinchfield, their attorneys, at the same time with the presenting and filing of their petition for writ of error in the above entitled proceedings, state that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Minnesota, in the above entitled matter, there are manifest errors, in this:

83 1. That there is not now, nor was there in 1912, any statutory authority in Minnesota for taxing members in such associations as the Chamber of Commerce of Minneapolis upon their memberships in such association; that the taxing of such members for their memberships for the year 1912 as shown herein, was and

is without authority and takes the property of the plaintiffs without due process of law, contrary to Section I, Article XIV of the Amendments to the constitution of the United States.

2. That there is not now, nor was there in 1912, any statutory authority in Minnesota for taxing members in such associations as the Chamber of Commerce of Minneapolis upon their memberships in such association; that the taxing of such members for their memberships for the year 1912 as shown herein, was and is without authority, and denies to the plaintiffs equal protection of the laws secured to them by Section I of the XIV Amendment to the constitution of the United States.

3. That there is not now, nor was there in 1912, any statutory authority in Minnesota for arbitrarily segregating such memberships as those of the plaintiffs in said association from those of all other similar organizations, such as named in the complaint and taxing those of the plaintiffs while all others of a similar class were not taxed, as was done in this proceeding; that such arbitrary and unwarranted taxation amounted to taking the property of the plaintiffs without due process of law, contrary to Section I of
84 Article XIV of the Amendments to the constitution of the United States.

4. That there is not now, nor was there in 1912, any statutory authority in Minnesota for arbitrarily segregating such memberships as those of the plaintiffs in said association from those of all other similar organizations, such as named in the complaint and taxing those of the plaintiffs while all others of a similar class were not taxed, as was done in this proceeding; that such arbitrary and unwarranted taxation amounts to a fraudulent denial to the plaintiffs of the equal protection of the laws secured to them by Section I of the XIV Amendment to the constitution of the United States.

5. That the taxing officers and the courts of said State have no authority in law or equity for allowing or upholding taxation of any property or any interest in property, except such authority as is given by statute; that the tax here imposed is held under nominal cover of a wholly unwarranted and arbitrary statutory construction, leaving as it does, the tax in question standing without authority of statutory, or other, law and thereby takes the property of the plaintiffs without due process of law, contrary to Section I of the XIV Amendment to the constitution of the United States.

6. That the taxing officers and the courts of said State have no authority in law or equity for allowing or upholding taxation of any property or any interest in property, except such authority as is given by statute; that the tax here imposed is held under nominal cover of a wholly unwarranted and arbitrary statutory construction,
leaving as it does, the tax in question standing without au-
85 thority of statutory, or other, law and thereby denies to the plaintiffs equal protection of the laws secured to them by Section I of the XIV Amendment to the constitution of the United States.

7. That said court had no statutory authority, or other authority, for refusing to allow the statutory definition as to taxable personal

property to be applied to the memberships of these plaintiffs in said association and to hold that they were taxable outside of the statutory provisions, and that by so doing it denies plaintiffs due process of law, contrary to Section I of Article XIV of the Amendments to the constitution of the United States.

8. That said court had no statutory authority, or other authority, for refusing to allow the statutory definition as to taxable personal property to be applied to the memberships of these plaintiffs in said association and to hold that they were taxable outside of the statutory provisions, and that by so doing it denies to the plaintiffs equal protection of the laws secured to them by Section I of the XIV Amendment to the constitution of the United States.

9. That said court erred in holding that a classification could be made, without statutory authority, as it was made by the taxing officers here, between the memberships in this association and those in other similar associations of the kind described in the complaint, and not be a denial to the plaintiffs of the equal protection of the laws secured to them by Section I of the XIV Amendment to the constitution of the United States.

10. That said court erred in holding that a classification could be made, without statutory authority, as it was made by the
86 taxing officers here, between the memberships in this association and those in other similar associations of the kind described in the complaint, and not be a denial to the plaintiffs of due process of law, contrary to Section I of the XIV Amendment to the constitution of the United States.

11. That the taxing statutes of Minnesota, as delimited here, permitted and required the taxing of such memberships in an arbitrary manner by the assessors outside of the statutory definition of personal property, and outside of any classification or method of taxing, based upon any legal authority, and amounted to a taking of the property of the plaintiffs without due process of law, contrary to Section I of Article XIV of the Amendments to the constitution of the United States.

12. That the taxing statutes of Minnesota, as delimited here, permitted and required the taxing of such memberships in an arbitrary manner by the assessors outside of the statutory definition of personal property and outside of any classification or method of taxing, based upon any legal authority, and denies to these plaintiffs the equal protection of law secured to them by Section I of the XIV Amendment to the constitution of the United States.

13. That under the facts of the complaint, as admitted by the demurrer, the unwarranted classifications according to the State practice, are found as facts and those findings are undisturbed by the said Supreme Court; that the taxation in this case became and is a question of law and equity outside of the rules applied in the case of State v. McPhail; that to hold that this case is ruled by
87 that denies to the plaintiffs in this case due process of law, contrary to Section I of the XIV Amendment to the constitution of the United States.

14. That under the facts of the complaint, as admitted by the

demurrer, the unwarranted and unequal classifications according to the State practice, are found as facts and those findings are undisturbed by the said Supreme Court; that the taxation in this case became and is a question of law and equity outside of the rules applied in the case of the State v. McPhail; that to hold that this case is ruled by that denies to these plaintiffs equal protection of the law secured to them by Section I of the XIV Amendment to the constitution of the United States.

15. That taxing, in Minneapolis, members of said association, residing outside of Minnesota, upon their said memberships, is a taking of their property without due process of law, contrary to Section I of the XIV Amendment to the constitution of the United States.

16. That taxing, in Minneapolis, the members residing in Minnesota, outside of Hennepin County, upon their said memberships, is a taking of their property without due process of law, contrary to Section I of the XIV Amendment to the constitution of the United States.

17. That the taxation, in Minneapolis, of members, residing outside of Minnesota, upon their said memberships in said association, violated the rule of equal legal protection secured to them by Section I of the XIV Amendment to the constitution of the United States.

18. That the taxation, in Minneapolis, of the members residing in Minnesota, outside of Hennepin County, upon their mem-
88 berships in said association, violated the rule of equal legal protection secured to them by Section I of the XIV Amendment to the constitution of the United States.

19. That the statutory provisions of said State under which said taxation was made, as construed and delimited herein, make a system of taxation for these plaintiffs upon said memberships that is unjustly and arbitrarily discriminatory as against them and in favor of members in other similar organizations of the same class in said State, and denies to these plaintiffs the equal protection of the laws under Section I of Article XIV of the Amendments to the constitution of the United States.

20. That the statutory provisions of said State under which said taxation was made, as construed and delimited herein, made a system of taxation for these plaintiffs upon said memberships that is unjustly and arbitrarily discriminatory as against them and in favor of other members in similar organizations of the same class in said State, and denies to these plaintiffs due process of law, contrary to Section I of the XIV Amendment to the constitution of the United States.

21. That the holding that said complaint did not state a cause of action within the provisions of Section I of Article XIV of the Amendments to the constitution of the United States as to due process of law, itself amounts to a denial of due process of law.

22. That the holding that said complaint did not state a cause of action within the provisions of Section I of Article XIV of the

Amendments to the constitution as to legal protection, itself
89 amounts to a denial to these plaintiffs of the equal protection of the laws secured to them by Section I of Article XIV of the Amendments to the constitution of the United States.

23. That said state of Minnesota has made and enforced a law herein which abridges the privileges and immunities of the plaintiffs as citizens of the United States, contrary to Section I of Article XIV of the Amendments to the constitution of the United States.

Wherefore, the said plaintiffs in error pray that the said judgment of the Supreme Court of the State of Minnesota be reversed and annulled; that the relief prayed in the original complaint be granted, and a judgment rendered in favor of the plaintiff in error and against the defendants in error herein.

Dated this 4th day of February, 1914.

MERCER, SWAN & STINCHFIELD,
Attorneys for Plaintiffs in Error, George D. Rogers, A. L. Goetzman, and F. E. Crandall, Representing Themselves and Others Similarly Situated.

90 STATE OF MINNESOTA:

In Supreme Court, October Term, A. D. 1913.

GEORGE D. ROGERS, A. L. GOETZMAN, and F. E. CRANDALL, Representing Themselves and Others Similarly Situated, Plaintiffs-Appellants,

vs.

COUNTY OF HENNEPIN, HENRY C. HANKE, as Its County Treasurer and Individually, and Al P. Erickson, as County Auditor and Individually, Defendants-Respondents.

Petition by Appellants, George D. Rogers, A. L. Goetzman, and F. E. Crandall, Representing Themselves and Others Similarly Situated, for Allowance of Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Minnesota, and for Supersedeas.

To the Honorable Calvin L. Brown, as Chief Justice of the Supreme Court of the State of Minnesota:

The Petition of George D. Rogers, A. L. Goetzman and F. E. Crandall, representing themselves and others similarly situated, plaintiffs in the above entitled proceedings and cause, shows:

That on the 4th day of February A. D. 1914, a final judgment (that term being used in Minnesota to cover "decree," Thompson v. Bickford, 19 Minn. 17) was entered in the Supreme Court of the State of Minnesota, the same being a tribunal having juris-
91 diction under the laws of the State of Minnesota to render final judgments in all proceedings and cases of such nature for said State, and said judgment being a final judgment in said cause and proceedings wherein these petitioners were plaintiffs on behalf of themselves and others similarly situated, and the County

of Hennepin, Henry C. Hanke, as its County Treasurer and individually, and Al P. Erickson, as County Auditor and individually, were defendants and respondents; said proceedings and cause having been brought by said petitioners as plaintiffs in the District Court within and for the county of Hennepin and State of Minnesota, and appealed by plaintiffs from a judgment rendered in said District Court against them and in favor of the defendants, to the effect that plaintiffs were entitled to no relief in their bill of complaint and that defendants have costs against the plaintiffs, as will appear by reference to the record and proceedings in said cause; and that said Supreme Court is the highest court in said state in which a decision in said suit could be had.

And your petitioners claim the right to remove said cause and final judgment to the Supreme Court of the United States by Writ of Error, under Section 709 of the Revised Statutes of the United States, and the acts amendatory thereof, because that in and by said cause and proceedings the following facts appear, and in connection with the same the following claims were and are made by said petitioners:

I.

It was shown in and by the complaint, which was admitted by the demurrer, and according to the State practice, Carlin v. Brackett, 38 Minn. 307; Dahs v. Holbert, 103 Minn. 283; N. P. Ry.
92 Co. v. Slaight, 205 U. S. 129, found by the judgment to be true as follows:

a. That for thirty years the Chamber of Commerce of Minneapolis was an institution incorporated under Chapter 138 of the General Laws of Minnesota for 1883; that it was a corporation in the nature of a voluntary association, (hereinafter called "association" for brevity),

"similar in principle, organization, conduct, control and relations among its members, to the relations of membership and control in churches, social clubs, fraternal societies, the Associated Press and voluntary business associations generally." (See complaint, paragraph 1.)

b. That for thirty years, and during the whole life of the law under which said association was created, it, and others similarly situated, existed and paid their taxes upon their assets in the regular way, and it had constantly been the construction of the laws of taxation throughout the state, that those memberships

"like those of lodges, fraternal orders, churches, that of the Associated Press, etc., were not and are not now taxable under the laws of Minnesota." (See complaint, paragraph 2.)

c. That the memberships in said Chamber were not owned by the members except conditionally; that their interests were subordinate to the interests of the association and its members, and conditional as to admission, control and disposition, and subject to the power

of fine, suspension and expulsion, and rules and regulations
93 made, as well as those to be made by the stipulated power of enactment, more stringent than the law would otherwise impose, (See complaint, pp. 2-3);

"That the said memberships do not represent the ownership of property in said association except simply in the way that memberships in such organizations as above described would represent property in equity."

d. That the memberships had various prices offered and paid for them on the market, running at different times in the past twelve years from a few hundred, to Five Thousand, Dollars, and at the time of the assessment, at $3,500.00 apiece, and that that value was entirely a contingent one, conditioned upon the rules and regulations for acquisition, control and disposition,

"and did not represent property that could be acquired, controlled, or disposed of except with the consent and subject to the regulations of said association outside of legal obligations." (See complaint, paragraph 6.)

e. That said corporation has no capital stock, and is not a stock corporation; it transacts no business for profit, and is limited in its business to owning and furnishing buildings and equipment to enable its members to have offices upon its premises, and to enable it to control the affairs of its members in relation to each other upon its grain exchange wherein the members transact business for themselves and for their customers only and not for the association; that it has rules and regulations under and by which the interests of every member in it and in and to their membership are held sub-
94 ordinate to its rules and regulations for admission, control, liens, debts owing to other members by virtue of dealing in the association, and the control of such memberships and the members, with the power of fine, suspension or expulsion over the memberships, held by said association.

f. That said association owns buildings and personal property for the carrying on of its business as aforesaid; that these buildings and that property were all fully and completely taxed in the city of Minneapolis, county of Hennepin and state of Minnesota, for the year 1912; that the said association has no property that was not so fully taxed, and no good will that produces any profit to it or is used for profit to it; that no one of the memberships is used for profit except to the individual member, and that this profit depends entirely upon the use to which he puts the membership. (See complaint, paragraph 5.)

g. That the memberships, in case of the closing out of the association, would have no value, above the assets already fully taxed, to the association.

h. That the Boards of Equalization declined to act because advised that it was a question for the courts to decide as to whether there was legal authority for the tax; that if the memberships represented the property and had been of the unqualified value of

$3,500.00 each, yet that sum, except $678.61 was already taxed once by taxation of the corporate assets. (See complaint, paragraph 6.)

i. That said Rogers is a local member, and said Crandall a member residing at Mankato and being one of a class whose memberships are located at their residences in Minnesota outside of
95 Hennepin County, (See complaint, p. 11); that the said Goetzman is a member residing at La Crosse, Wisconsin, and represents a class of non-resident memberships located at their respective homes outside of Minnesota (See complaint, p. 11); that in all there were 550 memberships, and equitable cognizance was taken to do equity and avoid multiplicity of litigation, (See complaint, p. 11).

j. That there were 550 memberships similarly situated, except as to residence of the members; that the action was brought on behalf of all of them; that they were each taxed on the basis of $3,500.00 apiece for the year 1912 under "moneys and credits," as if the assets of the corporation had not already been taxed, and as if the memberships were property in the general sense;

"that the memberships in the Associated Press, lodges, fraternal orders, churches, etc., were not taxed in said city, although standing in a similar position; and a discrimination was thereby made, not only unlawfully, but prejudicially"

as against members of this association

"by unequally assessing them and taking their property without due process of law, contrary to the state and federal constitutions," (See complaint, paragraph 8).

k. The prayer was for a restraining order, which was granted; for a temporary and permanent injunction against enforcement of the taxes; for the cancellation of the taxes and general equitable relief.

96 1. To that complaint there was a general demurrer interposed; there was a restraining order granted against defendants, and an order to show cause why the temporary injunction should not be granted; the motion for temporary injunction was brought on for hearing with the demurrer, and both heard together on the merits; the court sustained the demurrer to the complaint without the privilege of pleading over, ordered that the motion for temporary injunction be denied, discharged the temporary restraining order, and granted a stay of thirty days; this was on May 23, 1913; on the 14th day of August 1913, the defendants moved for judgment against the plaintiffs and that the plaintiffs take nothing, and for costs in favor of the defendants; that motion was brought on for hearing on the 28th day of August, 1913, and was granted, and it was ordered that judgment be entered against the plaintiffs and in favor of the defendants to the effect that the plaintiffs take nothing by the action, and that defendants have $10.00 costs and disbursements.

m. Judgment was entered on the 28th day of August, 1913, pursuant to that order as follows:

"Now pursuant to said order and on motion of James Robertson, Esq., attorney for defendant, it is hereby adjudged that the plaintiffs take nothing by this action and that the defendants recover of the plaintiffs and each of them the sum of ten dollars costs."

n. The plaintiffs and petitioners herein, on the 28th day of August, 1913, duly appealed to the Supreme Court of the State of Minnesota from that judgment.

97 II.

That in and by the assignment of errors in the Supreme Court of the State of Minnesota it was charged and argued to that court, among other things, that the trial court erred in holding:

1. That the memberships were taxable under the Minnesota statute (Errors 1, 2, 3, 5, 6, 7); that the assessment was not double taxation, except to the extent of $678.61 each (Error 4); that such assessment was a taking of property of the respective members without due process of law, contrary to both the State and Federal constitutions, (Errors, 8, 9, 12-14).

2. In refusing to hold that the assessment of these memberships and the exemption of those of the same and similar class denied to the respective members the equal protection of the laws under both the State and Federal constitutions, (Errors 10, 11).

3. In refusing to hold that the taxation of the memberships, by placing personal obligations upon the members, was a taking of property without compensation and without due process of law, contrary to both the State and Federal constitutions, (Error 12).

4. That the placing of a personal obligation by such taxation upon those members who were non-residents of Minnesota, and upon those who resided and kept their memberships outside of Hennepin County, was a taking of property without due process of law, contrary to both the State and Federal constitutions, (Errors 8, 9, 12-14).

III.

That it was set up and shown to said court in the written argument under proper "Assignment of Errors":

a. That the statute authorizing such corporations provides:

98 "It may prescribe the terms and conditions of its membership, the mode of admission of members." (See G. L. Minn. 1883 Ch. 138).

b. That the Supreme Court of Minnesota had previously held that members could only become such according to its Rules.

McCarthy Bros. v. Chamber of Commerce of Mpls., 105 Minn. 497;

that the same court had also treated it as having the class of restrictions as to membership *that* the general associations of the class for which we claimed using, in Evans v. Chamber of Commerce, 86 Minn. 448, the following language:

"This is nothing new or novel, for such conditions are annexed to

membership in many societies or associations, social, fraternal and religious."

c. That the statutes of the state establishing the policy have always treated this sort of association as of the class above described in its statutes and Revisions thereof; that the Codification of 1905 was upon the work of a commission, whose report to the legislature was enacted on detailed study, classified this sort of associations, under the General Classification of "Social and Charitable Corporations." (See Rev. Laws of Minn. 1905, pp. 614-616; that they are likewise treated by the commission, consisting of the Chief Justice, the Attorney General and Governor in the Revision made by the aid of an editor in 1913, and so classified again and placed between
99 "Corporations to Administer Charities" and "Camp Meeting Associations." (See Gen. Stat. of Minn. 1913, Sec. 6535).

d. That as early as 1859, in Sibley v. Banning, 3 Minn. 389 (282) the Supreme Court of Minnesota had defined property as

"The exclusive right of possessing, enjoying, and disposing of a thing";

that in that case it also said:

"In the same general sense has the legislature made use of the term property elsewhere in the statute, as in provision for taxation, and in defining its use in Sec. 18, p. 736 Rev. Stat., on crimes and punishments";

that the property then defined for these purposes was, in substance, as it now is, for taxes "all real and personal property," (See Sec. 794 Rev. L. Minn. 1905) that thereafter the legislature broadened the definition of "property" as to crimes by adding:

"and every right and interest therein";

that an attempt was made before the Legislature in 1913 to get the statute broadened as to taxation to single out the memberships in this association and the Duluth Board of Trade and tax them by statute, but it failed.

e. That the statutes of Minnesota had classified corporations with stock, including Building and Loan Associations, (Rev. Laws 1905 Sections 3048-3078), and such as engaged in business for profit and
• provided for their listing (Rev. L. 1905 Sec. 838), and their assessment (Rev. L. 1905, Sec. 835); but had not provided for the
100 assessment of the memberships in the non-earning associations having membership as distinguished from stock, such as this association and others found in Sec. 3079-3168 Rev. L. 1905; that the statutory definition of personal property (Sec. 797 Rev. Laws 1905) did not cover them; that the method laid out in the statute for arriving at values did not cover them (Rev. Stat. 1905, Sec. 838).

IV.

That the Supreme Court of Minnesota, notwithstanding these claims upon the part of plaintiffs, decided and affirmed said cause

with, and by reference to, an opinion filed on the same day in McPhail v. Duluth, wherein it decided that the following principle controlled.

a. That the memberships were property which the legislature might tax.

b. That the statutory definition of personal property, and the enumeration of the divisions thereof for taxation purposes, were not controlling.

c. That the taxation did not violate any provision of either the State *of* Federal constitution, particularly was it not double taxation, want of due process of law, or a violation of the equal protection clause, all of which allegations, assignments, and rulings, appear more fully by the record in said cause which is herewith submitted.

101 Wherefore, your petitioners pray the allowance of a Writ of Error returnable in the Supreme Court of the United States, and for citation and supersedeas; and your petitioners will ever pray, etc.

GEO. D. ROGERS,
A. L. GOETZMAN,
F. E. CRANDALL,
Petitioners, Representing Themselves and Others Similarly Situated,
By MERCER, SWAN & STINCHFIELD,
As Attorneys for Petitioners.

Upon motion of Messrs. Mercer, Swan & Stinchfield, attorneys for the plaintiffs, and upon filing a petition for Writ of Error and Assignment of Errors herein, it is ordered that a Writ of Error be and hereby is allowed and directed to issue as prayed, and that the amount of supersedeas bond herein be fixed at the sum of Seventy-five hundred Dollars.

Dated this 6th day of February, 1914.

CALVIN L. BROWN,
As Chief Justice of the Supreme Court of the State of Minnesota.

102 STATE OF MINNESOTA:

In Supreme Court, October Term, A. D. 1913.

GEORGE D. ROGERS, A. L. GOETZMAN, and F. E. CRANDALL, Representing Themselves and Others Similarly Situated, Plaintiffs-Appellants,

vs.

COUNTY OF HENNEPIN, HENRY C. HANKE, as Its County Treasurer and Individually, and AL P. ERICKSON, as County Auditor and Individually, Defendants-Respondents.

Undertaking for Supersedeas on Application for Writ of Error from the Supreme Court of the United States to the Supreme Court of Minnesota.

Whereas, on the 4th day of February, 1914, in the Supreme Court of the State of Minnesota a final judgment was entered in favor of the defendants and against the plaintiffs in the above entitled action to the effect that the plaintiffs have no relief and that the defendants have their costs and disbursements therein, taxed and allowed in the said Supreme Court at Forty-nine and 50/100 Dollars, and

Whereas, the said action was brought by the plaintiffs, representing themselves and others, to restrain the defendants from enforcing taxes assessed against the plaintiffs as members of the Chamber of Commerce of Minneapolis on account of such membership, and

Whereas, a restraining order was granted originally in
103 said action and then dissolved and a judgment entered for defendants and an appeal to said Supreme Court from such judgment taken, and

Whereas, said taxes assessed to the several members amount to a little over $5,000.00, and

Whereas, a stay in the connection of said taxes is desired, pending the removal of said case from said State court to the Supreme Court of the United States, and during the time until a final decision can be made by the last named court.

Now therefore, the undersigned, the United States Fidelity & Guaranty Company, does hereby undertake that the said appellants will pay, or cause to be paid, the whole amount of said taxes, including just damages for delay, and costs and interest on the appeal, in case said decision be not reversed or if reversed in part, then in so far as it is not reversed, and that said appellants will prosecute said Writ of Error to effect, but that the total obligation hereunder shall not exceed the sum of Seventy-five Hundred Dollars.

Dated this third day of February, 1914.

UNITED STATES FIDELITY AND
GUARANTY COMPANY. [SEAL.]
By WIRT WILSON AND
GEORGE E. MURPHY. [SEAL.]
[SEAL.] *Its Attorneys-in-Fact.*

Signed, Sealed and Delivered in Presence of—
F. G. SCALLEN.
A. E. JOHNSON.

104 STATE OF MINNESOTA,
County of Hennepin, ss:

On this 3rd day of February 1914, before me, a notary public within and for said County and State, personally appeared Wirt Wilson and George E. Murphy, to me personally known, who being by me duly sworn upon oath did say that they are the Agents and Attorneys-in-fact of and for the United States Fidelity and Guaranty Company, a corporation of Baltimore, Maryland, created, organized and existing under and by virtue of the laws of the State of Maryland; that the corporate seal affixed to the foregoing within instrument is the seal of said Company; that the said seal was affixed and the said instrument was executed by authority of its Board of Directors; and the said Wirt Wilson and George E. Murphy executed the said instrument as the free act and deed of said Company.

[SEAL.] MAXWELL SUSSMAN,
Notary Public, Hennepin County, Minnesota.

My commission expires November 18, 1920.

105 Upon the attached stipulation the foregoing bond is hereby approved, and the collection of the taxes in question stayed until the final determination of this cause.

Dated this 5th day of February, 1914.

CALVIN L. BROWN,
As Chief Justice of the Supreme Court of Minnesota.

Filed February 5, 1914. I. A. Caswell, Clerk.

106 STATE OF MINNESOTA:

In Supreme Court, October Term, A. D. 1913.

GEORGE D. ROGERS, A. L. GOETZMAN, and F. E. CRANDALL, Representing Themselves and Others Similarly Situated, Plaintiffs-Appellants,

vs.

COUNTY OF HENNEPIN, HENRY C. HANKE, as Its County Treasurer and Individually, and AL P. ERICKSON, as County Auditor and Individually, Defendants-Respondents.

It is hereby stipulated by and between the plaintiffs-appellants and the defendants-respondents, through their respective counsel, that the attached undertaking may be, and hereby is, approved in lieu of a supersedeas bond and with the same force and effect herein; that the collection of the taxes in question shall be stayed until the final determination of this cause; and that the said undertaking may be approved and the said stay granted, according to the order attached thereto, without further notice.

It is hereby further stipulated that the complete record on appeal from the District court was transmitted to the Supreme Court of Minnesota, according to the usual practice in such State; also that

the assignment of errors, consisting of fourteen specifications,
107 and statement of facts, consisting of fourteen specifications, filed in the State Supreme Court in said cause were filed with the brief of appellant, and all urged in said brief in said court according to the usual practice.

Dated this 4th day of February, 1914.

JAMES ROBERTSON &
RICHARD S. WIGGIN,
Attorneys for Defendants-Respondents.
MERCER, SWAN & STINCHFIELD,
Attorneys for Plaintiffs-Appellants.

Filed February 5, 1914. I. A. Caswell, Clerk.

108 Supreme Court of the United States.

GEORGE D. ROGERS, A. L. GOETZMAN, and F. E. CRANDALL, Representing Themselves and Others Similarly Situated, Plaintiffs in Error,

vs.

COUNTY OF HENNEPIN, HENRY C. HANKE, as its County Treasurer and Individually, and AL P. ERICKSON, as County Auditor and Individually, Defendants in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Minnesota, before you or some of you, being the highest court of law or equity in said state in which a decision could be had, in the said suit between George D. Rogers, A. L. Goetzman and F. E. Crandall, representing themselves and others similarly situated, Plaintiffs, Appellants, and the County of Hennepin, Henry C. Hanke, as its County Treasurer and individually, and Al P. Erickson, as County Auditor and individually, Defendants, Respondents, wherein was drawn in question the validity of a statute of said state, and the validity of the action of the taxing officers and the Trial Court and the Supreme Court, and the action of said state,
109 on the ground of each of them being repugnant to the Constitution and laws of the United States, and the decision was in favor of such validity; and wherein was drawn in question the validity of an authority exercised under said state, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such validity; and wherein was drawn in question the construction and effect of certain statutes of the

United States, and the construction and validity of certain statutes of said state, and the decision was against the title, right, and privilege and immunity specially set up and claimed under said statutes and said Federal Constitution, a manifest error hath happened to the great damage of the said George D. Rogers, A. L. Goetzman and F. E. Crandall, representing themselves and others similarly situated, as by their complaint appears, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the Capitol in the City of Washington, together with this writ, so that you have the same at said place, before the Justices aforesaid, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

110 Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 5th day of February in the year of our Lord one thousand nine hundred and fourteen.

[U. S. Dist. Court Seal, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk of the District Court of the United States
for the District of Minnesota,
By MARGARET L. MULLANE,
Deputy Clerk.

The above writ is allowed.
Dated this 5th day of February, 1914.

CALVIN L. BROWN,
As Chief Justice of the Supreme Court of Minnesota.

111 *Certificate of Lodgment.*

SUPREME COURT,
State of Minnesota, ss:

I, I. A. Caswell, clerk of the said court, do hereby certify that there was lodged with me as such clerk on February 5, 1914, in the matter of George D. Rogers, et al., versus County of Hennepin, et al.

The original bond and stipulation of which a copy is herein set forth.

Copies of the writ of error, as herein set forth,—one for each defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed

the seal of said Court at my office in St. Paul, Minnesota, this February 25, 1914.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

112 Supreme Court of the United States.

GEORGE D. ROGERS, A. L. GOETZMAN, and F. H. CRANDALL, Representing Themselves and Others Similarly Situated, Plaintiffs in Error,

vs.

COUNTY OF HENNEPIN, HENRY C. HANKE, as its County Treasurer and Individually, and AL P. ERICKSON, as County Auditor and Individually, Defendants in Error.

Citation.

United States of America to County of Hennepin, Henry C. Hanke, as its County Treasurer and Individually, and Al P. Erickson, as County Auditor and Individually, and R. S. Wiggin, as attorney for Defendants in Error:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States, in the District of Columbia, within thirty days after the date hereof, pursuant to writ of error filed in the office of the Clerk of the Supreme Court of the State of Minnesota, wherein George D. Rogers, A. L. Goetzman and F. H. Crandall, representing themselves and others similarly situated are plaintiffs in error, and the County of Hennepin, Henry C. Hanke, as its County Treasurer and individually, and Al P. Erickson, as County Auditor and individually, are defendants in error, to show cause, if any there be, why the judgment ren-
113 dered against the plaintiffs in error as in said writ mentioned should not be corrected and speedy justice should not be done in that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States this 5th day of February, 1914.

CALVIN L. BROWN,
As Chief Justice, Supreme Court of the State of Minnesota.

Personal service of the foregoing and receipt of copy hereby admitted at Minneapolis, Minnesota, this 4th day of February, 1914.

JAMES ROBERTSON,
County Attorney, and
R. S. WIGGIN,
Assistant County Attorney of Hennepin County, and Attorneys for Defendants in Error.

114 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Minnesota, ss:

In obedience to the commands of the within Writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Minnesota, in the city of St. Paul, this February 25, 1914.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

Costs of transcript $28.75, paid by Plaintiffs in Error.

I. A. CASWELL, *Clerk.*

115 Supreme Court of the United States.

GEORGE D. ROGERS, A. L. GOETZMAN, and F. E. CRANDALL, Representing Themselves and Others Similarly Situated, Plaintiffs in Error,

vs.

COUNTY OF HENNEPIN, HENRY C. HANKE, as Its County Treaurer and Individually, and Al. P. Erickson, as County Auditor and Individually, Defendants in Error.

Præcipe of Appearance.

To the clerk of the above-named court:

You will please enter our appearance as counsel for Plaintiffs in Error in the above entitled action.

Dated February 5th, 1914.

H. V. MERCER,
JOS. G. SWAN,
F. H. STINCHFIELD,
500-510 *Security Bank Bldg., Minneapolis, Minnesota.*

116 [Endorsed:] Supreme Court of the United States. George D. Rogers et al. vs. County of Hennepin et al. Præcipe of Appearance.

117 In the Supreme Court of the United States.

960—24111.

GEORGE D. ROGERS, FRANK E. CRANDALL, and ALFRED L. GOETZMAN, Each as Representing Himself and Others of a Similar Class, Plaintiffs in Error,

vs.

THE COUNTY OF HENNEPIN, HENRY C. HANKE, as Its County Treasurer and Individually, and Al P. Erickson, as County Auditor and Individually, Defendants in Error.

Statement of Errors on Which Plaintiffs in Error Rely, with Designation of Parts of Record to be Printed.

Law Offices of Mercer Swan & Stinchfield, 500-510 Security Bank Bldg., Minneapolis.

118 In the Supreme Court of the United States.

GEORGE D. ROGERS, FRANK E. CRANDALL, and ALFRED L. GOETZMAN, Each as Representing Himself and Others of a Similar Class, Plaintiffs in Error,

vs.

THE COUNTY OF HENNEPIN, HENRY C. HANKE, as Its County Treasurer and Individually, and Al P. Erickson, as County Auditor and Individually, Defendants in Error.

Statement of Errors on Which Plaintiffs in Error Rely, with Designation of Parts of Record to be Printed.

To the Clerk of the Supreme Court of the United States:

I.

The plaintiffs in error, for their statement as to the errors on which they intend to rely herein, hereby specify that they rely upon errors assigned by them for their writ of error from this Court to the Supreme Court of Minnesota in this cause, numbers 1 to 23 inclusive, and the prayer for reversal which errors have been returned by the Supreme Court of the State of Minnesota to this Court herein and are as follows:

"1. That there is not now, nor was there in 1912, any statutory authority in Minnesota for taxing members in such associations as the Chamber of Commerce of Minneapolis upon their memberships in such association; that the taxing of such members

119 for their memberships for the year 1912 as shown herein, was and is without authority and takes the property of the plaintiffs without due process of law, contrary to Section I, Article XIV of the Amendments to the constitution of the United States.

"2. That there is not now, nor was there in 1912, any statutory authority in Minnesota for taxing members in such associations as the Chamber of Commerce of Minneapolis upon their memberships in such association; that the taxing of such members for their memberships for the year 1912 as shown herein was and is without authority, and denies to the plaintiffs equal protection of the Laws secured to them by Section I of the XIV Amendment to the constitution of the United States.

"3. That there is not now, nor was there in 1912, any statutory authority in Minnesota for arbitrarily segregating such memberships as those of the plaintiffs in said association from those of all other similar organizations, such as named in the complaint and taxing those of the plaintiffs while all others of a similar class were not taxed, as was done in this proceeding; that such arbitrary and unwarranted taxation amounted to taking the property of the plaintiffs without due process of law, contrary to Section I of Article XIV of the Amendments to the constitution of the United States.

"4. That there is not now, nor was there in 1912, any statutory authority in Minnesota for arbitrarily segregating such memberships as those of the plaintiffs in said association from those of all other similar organizations, such as named in the complaint and taxing those of the plaintiffs while all others of a similar class
120 were not taxed, as was done in this proceeding; that such arbitrary and unwarranted taxation amounts to a fraudulent denial to the plaintiffs of the equal protection of the laws secured to them by Section I of the XIV Amendment to the constitution of the United States.

"5. That the taxing officers and the courts of said State have no authority in law or equity for allowing or upholding taxation of any property or any interest in property, except such authority as is given by statute; that the tax here imposed is held under nominal cover of a wholly unwarranted and arbitrary statutory construction, leaving as it does, the tax in question standing without authority of statutory, or other, law and thereby takes the property of the plaintiffs without due process of law contrary to Section I of the XIV Amendment to the constitution of the United States.

"6. That the taxing officers and the courts of said State have no authority in law or equity for allowing or upholding taxation of any property or any interest in property, except such authority as is given by statute; that the tax here imposed is held under nominal cover of a wholly unwarranted and arbitrary statutory construction, leaving as it does, the tax in question standing without authority of statutory, or other, law and thereby denies to the plaintiffs equal protection of the laws secured to them by Section I of the XIV Amendment to the constitution of the United States.

"7. That said court had no statutory authority, or other authority, for refusing to allow the statutory definition as to taxable personal property to be applied to the memberships of these plaintiffs in said association and to hold that they were taxable outside
121 of the statutory provisions, and that by so doing it denied plaintiffs due process of law, contrary to Section I of Article XIV of the Amendments to the constitution of the United States.

"8. That said court had no statutory authority, or other authority, for refusing to allow the statutory definition as to taxable personal property to be applied to the memberships of these plaintiffs in said association and to hold that they were taxable outside of the statutory provisions, and that by so doing it denied to the plaintiffs equal protection of the laws secured to them by Section I of the XIV Amendment to the constitution of the United States.

"9. That said court erred in holding that a classification could be made, without statutory authority, as it was made by the taxing officers here, between the memberships in this association and those in other similar associations of the kind described in the complaint, and not be a denial to the plaintiffs of the equal protection *to* the laws secured to them by Section I of the XIV Amendment to the constitution of the United States.

"10. That said court erred in holding that a classification could be made, without statutory authority, as it was made by the taxing officers here, between the memberships in this association and those in other similar associations of the kind described in the complaint, and not be a denial to the plaintiffs of due process of law, contrary to Section I of the XIV Amendment to the constitution of the United States.

"11. That the taxing statutes of Minnesota, as delimited
122 here, permitted and required the taxing of such memberships in an arbitrary manner by the assessors outside of the statutory definition of personal property, and outside of any classification or method of taxing, based upon any legal authority, and amounted to a taking of the property of the plaintiffs without due process of law, contrary to Section I of Article XIV of the Amendments to the constitution of the United States.

"12. That the taxing statutes of Minnesota, as delimited here, permitted and required the taxing of such memberships in an arbitrary manner by the assessors outside of the statutory definition of personal property and outside of any classification or method of taxing, based upon any legal authority, and denies to these plaintiffs the equal protection of law secured to them by Section I of the XIV Amendment to the constitution of the United States.

"13. That under the facts of the complaint, as admitted by the demurrer, the unwarranted classifications according to the State practice, are found as facts and those findings are undisturbed by the said Supreme Court; that the taxation in this case became and is a question of law and equity outside of the rules applied in the case of State v. McPhail; that to hold that this case is ruled by that denies to the plaintiffs in this case due process of law, contrary to Section I of the XIV Amendment to the constitution of the United States.

"14. That under the facts of the complaint, as admitted by the demurrer, the unwarranted and unequal classifications according to the State practice, are found as facts and those findings are undisturbed by the said Supreme Court; that the taxation in
123 this case became and is a question of law and equity outside of the rules applied in the case of the State v. McPhail;

that to hold that this case is ruled by that denies to these plaintiffs equal protection of the law secured to them by Section I of the XIV Amendment to the constitution of the United States.

"15. That taxing, in Minneapolis, members of said associations, residing outside of Minnesota, upon their said memberships, is a taking of their property without due process of law, contrary to Section I of the XIV Amendment to the constitution of the United States.

"16. That taxing, in Minneapolis, the members residing in Minnesota, outside of Hennepin County, upon their said memberships, is a taking of their property without due process of law, contrary to Section I of the XIV Amendment to the constitution of the United States.

"17. That the taxation, in Minneapolis, of members, residing outside of Minnesato, upon their memberships in said association, violated the rule of equal legal protection secured to them by Section I of the XIV Amendment to the constitution of the United States.

"18. That the taxation, in Minneapolis, of the members residing in Minnesota, outside of Hennepin County, upon their memberships in said association, violated the rule of equal legal protection secured to them by Section X of the XIV Amendment to the constitution of the United States.

"19. That the statutory provisions of said State under which said taxation was made, as construed and delimited herein, make a system of taxation for these plaintiffs upon said memberships that is unjustly and arbitrarily discriminatory as against them and
124 in favor of members in other similar organizations of the same class in said state, and denies to these plaintiffs the equal protection of the laws under Section I of Article XIV of the Amendments to the constitution of the United States.

"20. That the statutory provisions of said State under which said taxation was made, as construed and delimited herein, made a system of taxation for these plaintiffs upon said memberships that is unjustly and arbitrarily discriminatory as against them and in favor of other members in similar organizations of the same class in said State, and denies to those plaintiffs due process of law, contrary to Section I of the XIV Amendment to the constitution of the United States.

"21. That the holding that said complaint did not state a cause of action within the provisions of Section I of Article XIV of the Amendments to the constitution of the United States as to due process of law, itself amounts to a denial of due process of law.

"22. That the holding that said complaint did not state a cause of action within the provisions of Section I of Article XIV of the Amendments to the constitution as to legal protection, itself amounts to a denial to these plaintiffs of the equal protection of the laws secured to them by Section I of Article XIV of the Amendments to the constitution of the United States.

"23. That said state of Minnesota has made and enforced a law herein which abridges the privileges and immunities of the plaintiffs as citizens of the United States, contrary to Section I
125 of Article XIV of the Amendments to the constitution of the United States."

II.

The plaintiffs in error hereby designate as being necessary for the consideration of said errors, the parts of the record which have been returned herein by the clerk of the Supreme Court of the State of Minnesota, as follows:

1. So much of the record in the trial court as was included within the Paper Book in the Supreme Court of Minnesota, pages one to eighteen (1 to 18) inclusive, with the complaint printed and the amendments incorporated therein, as shown in that Paper Book, a copy of which is hereto attached, marked Exhibit "A," and made a part hereof, except that the title to said cause shall be appropriate for this court; but it is further agreed that in lieu of the appendix attached to said record hereto as a part of said Paper Book, the clerk may omit the specific names of the members and print the following statement:

"The list of members as shown by the record includes 550 members of the Chamber of Commerce of Minneapolis, 443 of whom reside in Minneapolis, Minnesota, 55 of whom reside in Minnesota outside of Hennepin County, and 52 of whom reside in states other than Minnesota."

2. Order of affirmance.
3. Judgment in Supreme Court of Minnesota.
4. Assignment of errors in State Supreme Court of Minnesota.

126 5. Statement of facts attached to assignment and stipulation thereon.

6. Certificate of Clerk of Supreme Court.
7. Assignment of Errors, served and filed with petition for writ of error from the Supreme Court of the United States to the Supreme Court of Minnesota.
8. Petition for allowance of said writ of error.
9. Order allowing said writ of error and fixing supersedeas.
10. Order approving same and staying collection of taxes.
11. Writ of error to Supreme Court of Minnesota.
12. Certificate of lodgment.
13. Citation.
14. Opinion of Supreme Court of the State of Minnesota herein.
15. Opinion in State v. McPhail in said court to which the opinion in this case refers as controlling.
16. Præcipe indicating records for transcript.
17. Return to writ.
18. All formal or clerical records that are usually printed, together with this document.

Dated June 2nd, 1914.

H. V. MERCER,
Counsel for Plaintiffs in Error.

127 The defendants in error hereby acknowledge due service of the foregoing statement of Specifications of Errors and Parts of Record for printing and consent that they are the proper portions of the record in the above entitled cause to be printed; that

the complaint may be printed in the form therein specified; and that the statement of the list of members may be printed in lieu of the actual names and addressed as specified in the foregoing, all without further notice or delay.

Dated this 3d day of June, 1914.

JAMES ROBERTSON,
County Attorney,
Counsel for Defendants in Error.
RICHARD S. WIGGIN,
Assistant County Attorney,
Counsel for Defendants in Error.

128 EXHIBIT "A."

STATE OF MINNESOTA:

Supreme Court, October Term, 1913.

GEORGE D. ROGERS (and as Amended), A. L. GOETZMAN, and F. E. CRANDALL, Appellants,

vs.

COUNTY OF HENNEPIN, HENRY C. HANKE, as Its County Treasurer and Individually, and Al P. Erickson, as County Auditor of said County and Individually, Respondents.

PAPER BOOK.

Wilson, Mercer, Swan & Stinchfield, Attorneys for Appellants, Minneapolis, Minnesota.
R. S. Wiggin, Attorney for Respondents, Minneapolis, Minn.

129 STATE OF MINNESOTA:

Supreme Court, October Term, 1913.

STATE OF MINNESOTA,
County of Hennepin:

District Court, Fourth Judicial District.

GEORGE D. ROGERS (and as Amended), A. L. GOETZMAN, and F. E. CRANDALL, Plaintiffs,

vs.

COUNTY OF HENNEPIN, HENRY C. HANKE, as Its County Treasurer and Individually, and Al P. Erickson, as County Auditor of said County and Individually, Defendants.

PAPER BOOK.

Notice of Motion.

To the Above-named Defendants:

You will each Take Notice that at the time specified in the attached Order, the plaintiff will move the court as follows: (1) for tem-

porary injunction restraining you and each of you from doing anything to enforce the taxes levied and assessed upon the plain-
130 tiff and other members of the Chamber of Commerce, upon their memberships in said association for the year 1912, during the pendency of this action; (2) for such other and further relief as to the court may seem just and equitable in the premises;

Which motion will be made and based upon the attached complaint and upon the ground that it will avoid a multiplicity of actions and prevent an injustice to the plaintiff thereby.

WILSON, MERCER, SWAN & STINCHFIELD,
Attorneys for Plaintiffs.

510 Security Bank Building, Minneapolis, Minn.
Dated, January 3, 1912.

(Title of Cause.)

Restraining Order.

Upon reading and filing the attached complaint, and upon all the files and records herein, it is hereby ordered:

That each and all of the above named defendants be and they hereby are restrained from entering any of the taxes upon the memberships of the members of the Chamber of Commerce of Minneapolis, including that of the plaintiff, until the further order of this court; and if any of the same be already entered upon the records, that no effort be made to enforce them until the further order
131 of this court; and that the hearing herein according to the attached motion may be held on the 7th day of January, 1913, at ten o'clock a. m., upon the Notice of Motion hereto attached; the time for said motion being shortened because of the urgency of the case.

Dated January 4th, 1913.

HORACE D. DICKINSON, *Judge.*

(Title of Cause.)

Summons.

The State of Minnesota to the Above-named Defendants:

You and each of you are hereby summoned and required to answer the complaint of the plaintiff in the above entitled action, which complaint is hereto annexed and herewith served upon you, and to serve a copy of your answer to the said complaint on the subscribers at their office, 510 Security Bank Building, in the city of Minneapolis, in the said County of Hennepin, within twenty (20) days after service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within the time

aforesaid, the plaintiff in this action will apply to the Court for the relief demanded in said complaint.

WILSON, MERCER, SWAN & STINCHFIELD,
Attorneys for Plaintiff.

510 Security Bank Building, Minneapolis, Minn.

132 (Title of Cause.)

Complaint.

(As Amended by Stipulations and Orders.)

For his complaint herein, plaintiff alleges:

1. That he is now and for about thirty years last past has been a member of the Chamber of Commerce of Minneapolis, an institution incorporated under Chapter 138 of the General Laws of Minnesota for the year 1883; that said institution is a corporation in the nature of a voluntary association similar in principle, organization, conduct, control, and relations among its members, to the relations of membership and control in churches, social clubs, fraternal societies, the Associated Press and voluntary business associations generally.

2. That said association has no capital stock and is not a stock corporation; that it transacts no business for profit, and is limited in its business to the owning and furnishing of buildings and sufficient equipment to enable its members to have offices upon its premises and to control the affairs of its members in their relations with each other upon the trading floor which in fact is a grain exchange wherein the members transact business for themselves and their customers only and not for said association; that it also has rules and regulations under and by which the interests of every member in it and in and to their memberships in it are held subordinate to its rules and regulations for admission, its rules
133 and regulations for control, and liens upon those memberships for debts owing to other members under and by virtue of dealings had in said association, and in the control of such memberships and the members and the power of fines, suspension or expulsion over such members from the memberships in said association; that every member who becomes such in said association, must first apply for membership therein in writing, and agree to abide by the rules and regulations and control of said association; that he must also present a certificate of membership to which, subject to the approval of the board of directors of said association, he is the owner; that he is then investigated and may be refused membership without excuse; that, if admitted, he is subject to a control, through the rules and regulations of said association, more stringent than the law would ordinarily prescribe upon members of a stock association, such as prohibitions against his reliance upon the statute of frauds as a defense, the transacting of business in such a way as to amount to uncommercial conduct, or such other regulations as would make him unfit to do business according to the highest spirit of business prin-

ciples with his associates, and subject to his expulsion, suspension or fine for the violation of such principles irrespective of whether they would be offenses against the law generally; that he does not acquire control of or own such membership except subject to the will of the members generally and such rules and regulations as a majority of them shall from time to time declare.

134 3. That to better facilitate the regulation of admission, control and disposition of memberships, the said association has general rules by which membership certificates are issued and by which one was issued to this plaintiff upon his agreeing, according to the usual practice, to be governed by the usages and customs of the charter rules and regulations of said association and all additions and amendments to such rules and regulations, and that a compliance therewith shall be and remain a condition precedent to the sale and transfer of his membership and his rights therein; that each and every member of said association acquires a membership according to the rules and regulations and the conditions above described and in no other way; that a membership certificate under such conditions is issued whenever the member is approved in accordance with such rules, and not until then, and he cannot transfer it into the name of any other person except through the same processes and subject to the same conditions.

4. That the said memberships do not represent the ownership of property in said association except simply in the way that memberships in such organizations as above described would represent property in equity.

5. That the said Chamber of Commerce of Minneapolis as a corporation owns buildings and personal property for the carrying on of its business as aforesaid, all of which have been fully and completely taxed in the city of Minneapolis, county of Hennepin and state of Minnesota for the year 1912; and said corporation

135 has no property that has not been fully taxed, and it has no good will that produces any profit to it or that is attempted in any way to be used for profit to it; that no one of such memberships is used for profit except by the individual member, and then his profit depends entirely upon the use to which he puts the membership.

6. That said memberships, in case of the closing out of such association, would have actually no value above the assets already fully taxed to said association; that at the present time said memberships have varied prices offered and bid for them on the market, ranging at different prices at different times of the year, and which have, during the last twelve years, run from a few hundred dollars up to as high as five thousand dollars ($5,000), and which, in fact, ran about thirty-five hundred dollars ($3,500) apiece at the time of the assessment herein; that if the total number of memberships had then been counted as representing the property of said corporation, and they had been of the value of $3,500 unqualifiedly, and the assessment made against the buildings and other property of said corporation had been deducted on the basis of the value assessed, so as to have left the net equity in such memberships on the basis

of the then contingent sale price, six hundred seventy-eight dollars and sixty-one cents ($678.61), would have been all that was left for property not otherwise taxed to said association, and the value of said sale price except in the last named above is based upon
136 the assets already taxed; that said value was entirely a contingent one and conditioned upon the rules and regulations for acquisition, control and disposal as above set forth, and did not represent property that could be acquired, controlled or disposed of except with the consent and subject to the regulations of said association outside of legal obligations.

7. That for about thirty (30) years, and during the whole period of the life of the law under which said organization was created, this association and others in the state of Minnesota or similar kind have existed and paid their taxes upon their assets in the regular way, and it has constantly been the construction of the laws of taxation throughout the state until the year 1912 that such memberships, like those of lodges, fraternal orders, churches, that of the Associated Press, etc., were not and are not taxable under the laws of Minnesota.

8. That there are five hundred and fifty (550) members of said association, similarly situated to this plaintiff, except that the names and residences of the owners of such membership, as they appeared upon May 1, 1912, as the date on which said assessment was made were as specified in the attached list, which is marked "Exhibit A" and hereby made a part hereof, and this action is brought on behalf of all of them, and they were each taxed by the taxing officials of the city of Minneapolis upon said memberships at the rate of thirty-five hundred dollars ($3,500) apiece for the year 1912, under "Moneys and Credits," just as if the assets of the corporation
137 had not been taxed and as if such memberships were property in the general sense; that the membership in the Associated Press, lodges, fraternal orders, churches, etc., were not taxed in said city, although standing in a similar position; and a discrimination was thereby made, not only unlawfully, but prejudicially as against this plaintiff and the other four hundred forty-nine (449) members of said association by unequally assessing them and taking their property without due process of law, contrary to the state and federal constitutions.

9. That this plaintiff duly appeared before the Board of Equalization of the city of Minneapolis and the Minnesota Tax Commission acting as the State Board of Equalization, and not only on behalf of himself, but on behalf of all the other said members, set up the facts and asked to have the said assessments canceled, and, if not canceled, to have taken out of said assessments the proportion of said assessment of $3,500 which the assets of said corporation, if deducted, would leave, so that, if there was any tax at all, it would be $678.61, instead of $3,500 as a basis of valuation; that said Boards were each inclined to grant the said application, or apparently so, and called respectively for their legal advisers, and in each instance were advised that it might be a question of sufficient doubt that the courts should pass upon whether or not this member-

ship under the circumstances above set out was property in a taxable sense which could be reached by the laws.

138 10. That this plaintiff understood at the time of said hearings that there was an action pending in Duluth which would be decided before the end of the year, and has only within a few days learned that that case has not been tried, and that plaintiff has delayed in bringing this action hoping to avoid the litigation.

11. That the said County of Hennepin and the officers above named threaten to and will, unless restrained or enjoined therefrom, immediately place the said taxes upon the records of this county and proceed to attempt to enforce them in the regular way against each of said individuals; that the question is a doubtful one, and if 550 defenses must be made, as they will be if the taxes are permitted to be enforced, it will make a multiplicity of litigation and a hardship upon each of the members compared to the amount involved, and a hardship and expensive litigation upon both the city of Minneapolis and the county of Hennepin and upon the state of Minnesota; that all of the parties interested, so far as the plaintiff can learn, are desirous and willing, if it can be done, that a speedy determination of the question at issue shall be made, and if possible made by this one action, so as to prevent the necessity of the multiplicity of litigation otherwise following.

That said F. E. Crandall is a resident of Mankato, Blue Earth county, Minnesota, and joins in this bill, on behalf of himself and all other members who are residents and citizens of other localities within said State, outside of the city of Minneapolis, accord-

139 ing to the addresses given hereinbefore; that said A. L. Goetzman is a citizen and resident of La Crosse, Wisconsin, and joins in this bill on behalf of himself and all other members who are residents and citizens of states other than Minnesota, as hereinbefore set forth; that both of said last named classes of members are too numerous to be made parties plaintiff herein; that all of the memberships held by said members, outside of those where the parties are residents of the city of Minneapolis, Minnesota, are cases in which the certificates of membership are kept at their respective residences, and the said respective members do not operate upon said Exchange personally, unless it be at rare intervals, but their use of such memberships is practically limited and confined to the benefits they get from having other members buy or sell grain for them as commission merchants, getting one-half the rates of regular commission, by reason of such a privilege extended to the members under the rules of said Association; that all of the matters in this paragraph alleged existed during all the times mentioned in said complaint, and especially during the times when the said assessments were made and thereafter.

Wherefore, the plaintiff prays this court first for a restraining order and a temporary injunction, and then a permanent injunction requiring the cancellation of all of said assessments, not only upon his membership, but upon the other four hundred forty-nine (449) memberships of said association; and that the defendants

be temporarily and permanently enjoined from enforcing
140 the same; and for such other and further relief as to the court may seem just and equitable in the premises.

WILSON, MERCER, SWAN & STINCHFIELD,
Attorneys for the Plaintiff.

510 Security Bank Building, Minneapolis, Minn.

STATE OF MINNESOTA,
County of Hennepin, ss:

George D. Rogers, being first duly sworn, upon oath says that he is the plaintiff in the foregoing entitled action; that he has read the foregoing complaint; that the same is true of his own knowledge except as to matters therein stated on information and belief, and as to such matters he believes it to be true.

GEORGE D. ROGERS.

Subscribed and sworn to before me this 4th day of January, 1913
[SEAL.] FREDERICK H. STINCHFIELD,
Notary Public, Hennepin County, Minnesota.

My commission expires Jan. 10, 1917.

"Exhibit A" attached to the amendment of the complaint is a printed list of members, showing that a large number of them reside in Minneapolis, a few in Hennepin county, outside of Minneapolis, others in Minnesota, outside of Hennepin county, and others in cities or states outside of Minnesota. This list consists of nearly 550 members with their names and address, and the list is
141 returned in the original files herein.

(Title of Cause.)

Demurrer.

Come now the defendants and demur to the complaint of the plaintiff in the above entitled action on the ground that the same does not state facts sufficient to constitute a cause of action.

Dated, January 21, 1913.

R. S. WIGGIN,
Second Assistant County Attorney,
Attorney for Defendants.

Service of the within demurrer admitted this 23d day of January, 1913.

WILSON, MERCER, SWAN & STINCHFIELD,
Attorneys for Plaintiff.

(Title of Cause.)

Order Sustaining Demurrer and Discharging Restraining Order.

The above entitled matter being regularly on the Special Term Calendar of the above named court for May 17th, 1913, came on for hearing before the undersigned, one of the Judges thereof, upon the demurrer of the defendants to plaintiff's complaint and on motion of plaintiffs for a temporary injunction, H. V.
142 Mercer, Esq., attorney
in support of the motion for temporary injunction and in opposition to defendant's demurrer, and Daniel Fish, Esq., city attorney, and R. S. Wiggin, Esq., second assistant county attorney, appeared for defendants in support of said demurrer and in opposition to plaintiff's motion for temporary injunction, and after hearing the arguments of counsel and being fully advised in the premises it is hereby ordered that the demurrer of defendants to plaintiff's complaint be and the same is hereby sustained, and

It is further ordered that plaintiff's motion for a temporary injunction restraining defendants and each of them from doing anything to enforce the taxes levied and assessed against the plaintiffs and other members of the Chamber of Commerce, upon their memberships in said association for the year 1912, during the pendency of this action, be and the same is hereby denied, and

It is further ordered that the temporary restraining order heretofore made in this cause be and the same is hereby discharged.

A stay of proceedings for thirty days is hereby ordered.

WILLIAM E. HALE,
Judge of District Court.

Dated May 23, 1913.

Filed May 23, 1913. P. S. Nielson, Clerk, by B. K. Wasmuth, Deputy.

143 (Title of Cause.)

Motion for Judgment.

Come now the defendants in the above entitled action and upon all the files and records in said action move the Court for judgment that plaintiffs are entitled to no relief therein and take nothing by said action, and for defendants' costs and disbursements herein.

R. S. WIGGIN,
Attorney for Defendants.

Dated August 14th, 1913.

(Title of Cause.)

Stipulation for Hearing of Motion for Judgment.

It is hereby stipulated by and between the parties to the above entitled action through their respective attorneys that the foregoing

Motion for Judgment may be brought on for hearing before the above named Court at Chambers on the 28th day of August, A. D. 1913, without further notice.

WILSON, MERCER, SWAN & STINCHFIELD,
Attorneys for Plaintiffs.
R. S. WIGGIN,
Attorney for Defendants.

Dated August 14th, 1913.

144 (Title of Cause.)

Order for Judgment.

The above entitled action being regularly upon the Chamber Calendar of the above named Court for the 28th day of August, A. D. 1913, on motion of defendants for judgment, came on for hearing on said date, R. S. Wiggin, Esq., attorney for defendants, appeared in support of said motion, and Messrs. Wilson, Mercer, Swan, Ware and Stinchfield, attorneys for plaintiffs, appeared in opposition thereto, and after hearing the arguments of counsel and being fully advised in the premises, it is ordered,

That said motion be and the same is hereby granted, and that judgment be entered in the above entitled action in favor of the defendants and against the plaintiffs; that plaintiffs are entitled to no relief herein and take nothing by this action, and that defendants recover of the plaintiffs the sum of $10.00 costs and the disbursements of this action.

Let judgment be entered accordingly.

WILLIAM E. HALE,
Judge of the District Court Aforesaid.

Dated August 28th, 1913.

(Title of Cause.)

Judgment.

AUGUST 28th, 1913.

145 This cause came on for hearing before the Court in Chambers on the 28th day of August, A. D. 1913, upon motion of defendants for judgment and the Court after hearing the arguments of counsel and being fully advised in the premises did on the 28th day of August, A. D. 1913, duly make and file its order granting said motion and for judgment herein.

Now, pursuant to said order and on motion of James Robertson, Esq., attorney for defendant, it is hereby adjudged that the plaintiffs take nothing by this action and that the defendants recover of the plaintiffs and each of them the sum of ten dollars costs.

By the Court.

P. S. NEILSON,
Clerk of District Court,
By B. K. WASMUTH, *Deputy.*

(Title of Cause.)

Notice of Appeal.

To R. S. Wiggin, attorney for the above-named defendants, and to P. S. Neilson, clerk of said District Court:

Please take notice, that the above named George D. Rogers, A. L. Goetzman and F. E. Crandall, appeal to the Supreme Court of the State of Minnesota, from the judgment of the said District Court entered herein on the 28th day of August, A. D. 1913, in favor of the defendants and against the plaintiffs; that plaintiffs are entitled to no relief herein and take nothing by this action and that
146 defendants recover of plaintiffs the sum of $10.00 costs and the disbursements of this action and from the whole thereof.

Dated this 28th day of August, A. D. 1913.

WILSON, MERCER, SWAN & STINCHFIELD,
Attorneys for Plaintiffs.

500-510 Security Bank Building, Minneapolis, Minn.

Bond in the sum of $250 duly approved by the Court August 29, 1913, and filed in the office of the Clerk of District Court on said date.

146½–157 (The list of members as shown by the record includes 550 members of The Chamber of Commerce of Minneapolis, 443 of whom reside in Minneapolis, Minnesota, 55 of whom reside in Minnesota outside of Hennepin County, and 52 of whom reside in states other than Minnesota.)

158 [Endorsed:] File No. 24,111. Supreme Court U. S. October term, 1913. Term No. 960. George D. Rogers et al., Pl'ffs in Error, vs. The County of Hennepin et al. Statement of Errors relied on & designation by Pl'ffs in error of parts of record to be printed & consent thereto. Filed June 5th, 1914.

Endorsed on cover: File No. 24,111. Minnesota Supreme Court. Term No. 104. George D. Rogers, A. L. Goetzman, and F. E. Crandall, representing themselves and others similarly situated, plaintiffs in error, vs. The County of Hennepin et al. Filed March 16th, 1914. File No. 24,111.

Supreme Court of the United States, October Term, 1915.

No. 104.

GEORGE D. ROGERS et al., Plaintiffs in Error,
vs.
THE COUNTY OF HENNEPIN et al.

STATE OF MINNESOTA:

In Supreme Court, October Term, A. D. 1913.

GEORGE D. ROGERS, A. L. GOETZMAN, and F. E. CRANDALL, Representing Themselves and Others Similarly Situated, Plaintiffs-Appellants,

vs.

COUNTY OF HENNEPIN, HENRY C. HANKE, as Its County Treasurer and Individually, and Al P. Erickson, as County Auditor and Individually, Defendants-Respondents.

It is hereby stipulated by and between the plaintiffs-appellants and the defendants-respondents, through their respective counsel, that the attached undertaking may be, and hereby is, approved in lieu of a supersedeas bond and with the same force and effect herein; that the collection of the taxes in question shall be stayed until the final determination of this cause; and that the said undertaking may be approved and the said stay granted, according to the order attached thereto, without further notice.

It is hereby further stipulated that the complete record on appeal from the District court was transmitted to the Supreme Court of Minnesota, according to the usual practice in such State; also that the assignment of errors, consisting of fourteen specifications, and statement of facts, consisting of fourteen specifications, filed in the State Supreme Court in said cause were filed with the brief of appellant, and all urged in said brief in said Court according to the usual practice.

Dated this 4th day of February, 1914.

JAMES ROBERTSON &
RICHARD S. WIGGIN,
Attorneys for Defendants-Respondents.
MERCER, SWAN & STINCHFIELD,
Attorneys for Plaintiffs-Appellants.

Filed February 5, 1914.
I. A. CASWELL, *Clerk.*

Supreme Court of the United States

OCTOBER TERM, 1915.

NO. 104.

GEORGE D. ROGERS, FRANK E. CRANDALL, and ALFRED L. GOETZMAN, each as representing himself and others similarly situated,

Plaintiffs in Error,

—vs—

THE COUNTY OF HENNEPIN, HENRY C. HANKE, as County Treasurer and individually, and AL. P. ERICKSON, as County Auditor, and individually,

Defendants in Error.

Brief of Plaintiffs in Error

STATEMENT OF THE CASE.

NATURE OF ACTION.

This is an action in equity brought in the State District Court in Hennepin County, Minnesota, to cancel tax assessments and enjoin the collection of taxes assessed in form as "Money and Credits" as against each of the five hundred and fifty (550) members of the Chamber of Commerce of Minneapolis, (Tr. pp. 39-45) to cover this membership in that association which is a corporation, for the year 1912.

ALL MEMBERS ARE PLAINTIFFS.

There are five hundred and fifty (550) members of this association, (Tr. p. 43, fol. 136), all in the same class, except that they are divided in this action into three groups, based solely on residence, for which respective groups the three named plantiffs appear, (Tr. p. 44, fol. 139).

George D. Rogers appears for the class of members who reside in Minneapolis, Hennepin County, Minnesota, where the taxation was made, (Tr. p. 43, fol. 136).

Frank E. Crandall appears for the class of members who are residents and citizens of other localities within the State of Minnesota, outside of the City of Minneapolis and County of Hennepin, (Tr. p. 44, f. 139).

Alfred L. Goetzman appears for the class of members who are residents and citizens of other states than Minnesota, (Tr. p. 44, f. 139).

This is the reason for the classification, as there may be a difference as to the power of local taxation. The memberships were held at the respective residences. (Tr., p. 44, fol. 139.)

HOW THE CASE AROSE.

This action was brought by the plaintiff Rogers on a complaint, (Tr. pp. 41-45, fols. 132-141), in behalf of himself and all other members of the association known as The Chamber of Commerce of Minneapolis.

That complaint was so amended as to have each of the respective plaintiffs appear for themselves and others of their respective classes, (Tr. p. 44, fol. 139), as above stated.

When the complaint was filed, a restraining order against the defendants was obtained, (Tr., p. 40, fol. 131); that order contained an order based on the urgency of the case, to cause the plaintiffs' motion for a temporary injunction to be heard January 7th, 1913, (Tr., pp. 39-40, fols. 130-131).

The defendants demurred to the complaint,

> "On the ground that the same does not state facts sufficient to constitute a cause of action." (Tr., p. 45, fol. 141.)

The argument upon the temporary injunction and the demurrer came before the trial court and were heard together, and it sustained the demurrer without the privilege of pleading over; it also denied the motion for temporary injunction and discharged the restraining order, (Tr., p. 46, fol. 142).

The defendants then moved for judgment, (Tr. p. 46, fol. 143), and the court ordered a judgment, (Tr. p. 47, fol. 144), as follows:

> "That said motion be and the same is hereby granted, and that judgment be entered in the above entitled action in favor of the defendants and against the plaintiffs; that plaintiffs are entitled to no relief herein and take nothing by this action, and that defendants recover of the plaintiffs the sum of $10.00 costs and the disbursements of this action."

Upon that order for judgment, the same day, the court entered a judgment as follows:

> "Now, pursuant to said order and on motion of James Robertson, Esq., attorney for defendant, it is hereby adjudged that the plaintiffs take nothing by this action and that the defendants recover of the plaintiffs and each of them the sum of ten dollars costs." (Tr., p. 47, fol. 145.)

An appeal was taken to the Supreme Court of the State of Minnesota, (Tr. p. 48, fol. 146). That court affirmed the decision of the lower court, making the judgment final, and by a memorandum opinion, (Tr., p. 9, fol. 66, 124 Minn. 539), based its judgment upon a decision made the same day in the case of State of Minnesota v. S. A. McPhail, 124 Minnesota, 398. That opinion also appears in the Transcript, pages 9-16. That opinion refers to the Rogers case and the briefs filed therein, (Tr., p. 16, fol. 79.

A judgment of affirmance was then entered in the Supreme Court of Minnesota, Tr., p. 1-2, fol. 51, and for costs, (Tr., p. 2, fol. 52) against the plaintiff in error.

The plaintiffs in error then petitioned for a Writ of Error from the Supreme Court of Minnesota to *this court*, (Tr., pp. 21-27, fol. 90-101), filing therewith their Assignments of Errors, (Tr., pp. 17-21, fol. 82-89), and the Writ of Error was allowed by the Chief Justice of the Supreme Court of Minnesota, on the 6th day of February, 1914, (Tr., p. 27, fol. 101).

THE FEDERAL RIGHTS SET UP, CLAIMED AND OVERRULED.

I.

In the complaint, the plaintiff Rogers, who was the only one specifically named in the beginning, alleged, (Tr., p. 41, fol. 132):

> "That he is now and for about thirty years last past

has been a member of the Chamber of Commerce of Minneapolis, an institution incorporated under Chapter 138 of the General Laws of Minnesota for the year 1883; that said institution is a corporation in the nature of a voluntary association similar in principle, organization, conduct, control and relations among its members, to the relations of membership and control in churches, social clubs, fraternal societies, the Associated Press and voluntary business associations generally."

II.

The complaint sets out in detail that there was no capital stock of the corporation and it transacts no business for profit but furnishes buildings and equipment to enable its members to have offices and to control the affairs of its members in their relations with each other upon its grain exchange. (Tr., pp. 41-42, fols. 133-134.)

"That it also has rules and regulations under and by which the interests of every member in it and in and to their memberships in it are held subordinate to its rules and regulations for admission, its rules and regulations for control, and liens upon those memberships for debts owing to other members under and by virtue of dealings had in said association, and in the control of such memberships and the members and the power of fines, suspension or expulsion over such members from the memberships in said association; that every member who becomes such in said association, must first apply for membership therein in writing, and agree to abide by the rules and regulations and control of said association; that he must also present a certificate of membership to which, subject to the approval of the board of directors of said association, he is the owner; that he is then investigated and may be refused membership without excuse; that, if admitted, he is subject to a control, through the rules and regulations of said association, more stringent than the law would ordinarily prescribe upon members of a stock association, such as prohibitions against his reliance upon the statute of frauds as a defense, the transacting of business in such a way as to amount to uncommercial conduct, or such other regulations as would make him unfit to do business according to the highest spirit of business principles with his associates, and subject to his expulsion, suspension or fine for the violation of such principles irrespective of whether they would be offenses against the law generally; that he does not acquire control of or own such membership except subject to the will of the members generally and

such rules and regulations as a majority of them shall from time to time declare.

"That to better facilitate the regulation of admission, control and disposition of memberships, the said association has general rules by which membership certificates are issued and by which one was issued to this plaintiff upon his agreeing, according to the usual practice, to be governed by the usages and customs of the charter rules and regulations of said association and all additions and amendments to such rules and regulations, and that a compliance therewith shall be and remain a condition precedent to the sale and transfer of his membership and his rights therein; that each and every member of said association acquires a membership according to the rules and regulations and the conditions above described and in no other way; that a membership certificate under such conditions is issued whenever the member is approved in accordance with such rules, and not until then, and he cannot transfer it into the name of any other person except through the same processes and subject to the same conditions.

"That the said memberships do not represent the ownership of property in said association except simply in the way that memberships in such organizations as above described would represent property in equity."

III.

It further sets out, (Tr., pp. 42-43, fols. 134-136):

"That the said Chamber of Commerce of Minneapolis as a corporation owns buildings and personal property for the carrying on of its business as aforesaid, all of which have been fully and completely taxed in the city of Minneapolis, County of Hennepin, and State of Minnesota, for the year 1912; and said corporation has no property that has not been fully taxed, and it has no good will that produces any profit to it or that is attempted in any way to be used for profit to it; that no one of such memberships is used for profit except by the individual member, and then his profit depends entirely upon the use to which he puts the membership.

"That said memberships, in case of the closing out of such association, would have actually no value above the assets already fully taxed to said association; that at the present time said memberships have varied prices offered and bid for them on the market, ranging at different prices at different times of the year, and which have during the last twelve years, run from a few hundred dollars up to as high as five thousand dollars ($5,000.00), and which, in fact, ran about thirty-five hundred dollars ($3,500.00) apiece at the time of the assessment herein; that if the total number of memberships

had then been counted as representing the property of said corporation, and they had been of the value of $3,500.00 unqualifiedly, and the assessment made against the buildings and other property of said corporation had been deducted on the basis of the value assessed, so as to have left the net equity in such memberships on the basis of the then contingent sale price, six hundred seventy-eight dollars and sixty-one cents ($678.61), would have been all that was left for property not otherwise taxed to said association, and the value of said sale price except in the last named above is based upon the assets already taxed; that said value was entirely a contingent one and conditioned upon the rules and regulations for acquisition, control and disposal as above set forth, and did not represent property that could be acquired, controlled or disposed of except with the consent and subject to the regulations of said association outside of legal obligations."

IV.

It also sets up in effect the practical construction that had been maintained in Minnesota for thirty years to be (Tr., p. 43, fol. 36)

> "That such memberships, like those of lodges, fraternal orders, churches, that of the Associated Press, etc., were not and are not taxable under the laws of Minnesota."

V.

It also sets up a list of members and alleges that they were each taxed on the sum of thirty-five hundred ($3500) dollars for the year 1912 under "Moneys and Credits," and that, (Tr., p. 43, fol. 137)

> "This action is brought on behalf of all of them, and they were each taxed by the taxing officials of the city of Minneapolis upon said memberships at the rate of thirty-five hundred dollars ($3,500.00) apiece for the year 1912, under "Moneys and Credits," just as if the assets of the corporation had not been taxed and as if such memberships were property in the general sense; that the memberships in the Associated Press, lodges, fraternal orders, churches, etc., were not taxed in said city, although standing in a similar position, and a discrimination was thereby made, not only unlawfully, but prejudicially as against this plaintiff and the other four hundred forty-nine (449) members of said association by unequally assessing them and taking their prop-

erty without due process of law, contrary to the state and federal constitutions."

VI.

The complaint also sets up (Tr., pp. 43-44, fol. 137):

> "That this plaintiff duly appeared before the Board of Equalization of the city of Minneapolis and the Minnesota Tax Commission acting as the State Board of Equalization, and not only on behalf of himself, but on behalf of all the other said members, set up the facts and asked to have the said assessments canceled, and, if not canceled, to have taken out of said assessments the proportion of said assessment of $3,500.00 which the assets of said corporation, if deducted, would leave, so that, if there was any tax at all, it would be $678.61, instead of $3,500.00 as a basis of valuation; that said Boards were each inclined to grant the said application, or apparently so, and called respectively for their legal advisers, and in each instance were advised that it might be a question of sufficient doubt that the courts should pass upon whether or not this membership under the circumstances above set out was property in a taxable sense which could be reached by the laws."

VII.

The complaint then sets up grounds to show the necessity of equitable interference to prevent a multiplicity of suits and defences. (Tr., p. 44, fol. 138.)

VIII.

And then sets up, (Tr., p. 44, fol 139), the residence of the respective plaintiffs and the classes they represent, and that

> "That all of the memberships held by said members, outside of those where the parties are residents of the city of Minneapolis, Minnesota, are cases in which the certificates of membership are kept at their respective residences, and the said respective members do not operate upon said Exchange personally, unless it be at rare intervals, but their use of such memberships is practically limited and confined to the benefits they get from having other members buy or sell grain for them as commission merchants, getting one-half the rates of regular commission, by reason of such a privilege extended to the members under the rules of said Association; that all of the matters in this paragraph alleged existed during all the times mentioned in said complaint, and es-

pecially during the times when the said assessments were made and thereafter."

IX.

The assignment of errors in the Supreme Court of Minnesota and the statement of facts claimed in that court appear as part of the record, (Tr., pp. 3-8). Those assignments of error in the State Supreme Court were as follows, (Tr., pp. 3-4, fol. 56-57). (References to P. B. F. are to the state record.)

"The plaintiff assigns that the trial court and the state erred:

1. In holding that any of the memberships assessed herein were assessable property. (Folio Paper Book, 21-22, 39-42, 48-49.)

2. In ordering and adjudging that the plaintiffs were not entitled to the temporary injunction herein, and in discharging the restraining orders. (F. P. B. 39-42.)

3. In holding that the complaint did not state a cause of action. (F. P. B. 39-42, 48-49.

4. In holding that the assessment here in question was not a double assessment, if said memberships represented property, except to the extent of $678.61. (F. P. B. 25-27, 39-42, 48-49.)

5. In holding that the memberships herein are property within the meaning of the Minnesota taxing statute. (F. P. B. 11-28, 39-42, 48-49.)

6. In holding that the memberships herein represented property at all, and especially above the physical assets already fully taxed. (F. P. B. 22, 39-42, 48-49.)

7. In holding that these memberships were either "money" or "credits." (F. P. B. 24, 39-42, 48-49.)

8. In ordering and adjudging that the plaintiff Goetzman, and the class represented by him, were subject to taxation on their memberships in Minneapolis, they being non-residents of the State of Minnesota. (F. P. B. 30-31, 39-42, 48-49.)

9. In ordering and adjudging that the plaintiff Crandall and those represented by him, are subject to taxation upon their memberships, said parties being non-residents of the city of Minneapolis, where the assessment was made.

10. In holding that it was not a discrimination under the amendment of 1906, Section 1 of Article 9 of the Constitution of Minnesota to assess these memberships and refuse to assess memberships in the Associated Press, lodges, fraternal orders, churches, etc., and all others of the same class. (F. P. B. 22-25, 39-42, 48-49.)

11. In holding that the assessments herein did not deny to the several members in the respective classes

the equal protection of the laws contrary to both the state and federal constitutions. (F. P. B. 25, 39-42, 48-49.)

12. In refusing to hold that the assessment of said memberships as personal obligations was a taking of the property of the said respective members without due process of law, and without compensation, and contrary to both the state and federal constitutions. (F. P. B. 25, 39-42, 48-49.)

13. In holding that the assessment of the memberships located outside of the city of Minneapolis, County of Hennepin, and placing a personal obligation upon the members, was within the jurisdiction of the taxing officers of Minneapolis, and thereby depriving the said respective members of their property without due process of law. (F. P. B. 31, 39-42, 48-49.)

14. In holding that the assessment of the memberships owned by non-residents of the state of Minnesota, and located outside of Minneapolis, were not beyond the jurisdiction of the taxing officials of the city of Minneapolis, and the taking of property without due process of law. (F. P. B. 31, 39-42, 48-49.)"

A statement of the facts, including some of the legal history of the Chamber with reference to its adjudicated status in Minnesota, was a part of the facts in the brief in the Supreme Court of Minnesota, and is found in the record (Tr., pp. 5-8).

ASSESSMENT WAS NOT WARRANTED UNDER MONEYS AND CREDITS.

The case of State v. McPhail, 124 Minn. 398, was decided upon the theory that under the facts in that case the members of the Duluth Board of Trade were not required to pay a second time upon the assets of the company, but were only assessed upon what might be called privileges of membership, (Tr., p. 16, fols. 78-79), while in the case at bar the assessment was upon an entirely different theory, without excluding the assets of the corporation that had already been taxed, and without being assessed as if memberships were general personal property; but placed under "Money and Credits," which is an entirely different system without statutory authority for the assessment of such memberships in that way. (Tr., p. 43, fols. 136-137). The Minnesota Supreme Court had before it, under Error No. 7, the question of whether it could assess these memberships as "Money and Credits," (Tr., p. 4, fol. 56). It also had before it, under Errors 7, 11-14, the question as to

whether the assessment, and the taxation in this case, (as "Money and Credits") violated the Fourteenth Amendment as shown by Errors 1, 3, 5, 7, 10, 11, 13, 15, and it decided this particular case by reference to the McPhail decision, without distinguishing them upon the point, and without making any decision upon this point other than such as could be implied from a general affirmance without deciding the effect that this fundamental distinction would have, (Tr., p. 16, fol. 79). And it is claimed in the Assignment of Errors herein, that the making of the assessment and decision as made herein (on "Money and Credits,") violates the XIV Amendment, and that in and of itself, this furnishes a federal ground for reversal, (Td., pp. 18-19, fols. 84-9).

RESIDENCE OF TAXPAYERS.

In this particular case the facts are fundamentally distinguishable as to the general nature of the memberships so far as the limitations of the right to acquire, to use and disseminate them, are concerned from those in the McPhail case, as is evident from the statement in the McPhail opinion, in the following particulars: (Tr., pp. 10-16.)

In its decision, the Minnesota Supreme Court took no account of these distinctions so far as anything appears in the opinion, (Tr., p. 9, fol. 66).

In this particular case, the three classes of memberships which depended upon the residence of the parties representing the three classes, was claimed as being a substantial right for decision as to the two classes residing outside of Hennepin County, Minnesota, for want of statutory authority to assess them in Hennepin County, Minnesota, irrespective of the validity of the assessment in general as to those residing in Hennepin County. This matter too, was set up and claimed in the complaint as being one of the things wherein the constitutional rights were violated. (Tr., p. 44, fol. 139), and assigned as errors 8-14 in the state court, (Tr., p. 4, fol. 56-57), and without any distinction upon this fundamental fact as to thtse classes, the Supreme Court of Minnesota affirmed the decision of the lower court as if this point, too, had not been in the case, (Tr., p. 9, fol. 66).

From this it is clearly evident that the Federal rights were set up and claimed in the Supreme Court of Minnesota, in the first place, by general allegations in the complaint; in the second place, by assignment of errors which were more specific. It is also evident from the Court's opinions that it understood it was deciding those questions, for in this particular case, at page 9 of the transcript, appears the Per Curiam decision which refers to State v. McPhail, 124 Minnesota 398, and in the McPhail case which also appears in the record opinion; by reason of the fact that this case was decided by reference thereto, (Rogers et al. v. Hennepin Co., 124 Minn. 539), and in order to decide these constitutional questions, the court said, in the McPhail case: (Tr., p. 16, fols. 78-79.)

> "We do not sustain the claims that the taxation of memberships in a Board of Trade or Stock Exchange, would violate provisions of the Federal or State constitution. It is argued that such taxation would be class legislation, and violate the equality clause in the Minnesota constitution, because the privileges enjoyed by members of social clubs, commercial clubs, golf clubs, secret and church societies, are not subject to taxation. We see no improper classification here, nor any lack of equality or uniformity. Nor would it be double taxation. The members of the Board are not required to pay taxes on the physical and tangible property of the Board, nor does the Board pay taxes upon the intangible rights which constitute the value of a membership.
>
> "And we hold that proceedings to tax such a membership do not deprive the member of his property without due process of law, take property for public use without just compensation, or deny such member the equal protection of the laws, in violation of familiar provisions of the Federal constitution and amendments.
>
> "Our conclusion, after a careful consideration of the arguments and briefs in this case and in the case of Rogers v. County of Hennepin, the decision in which is filed herewith, is that the trial court properly rendered judgment against defendant for the tax assessed against his membership in the Duluth Board of Trade."

WHAT THE DULUTH CASE DOES NOT DO.

That case does not have in it, nor does it cover, nor does the decision in this case, cover, any of the following questions raised in that court for this case:

a. That the taxation here was on "money and credits,"

(Tr., p. 43, fol. 136), and consequently without due process of law, or equal protection as secured by the Fourteenth Amendment (Tr., p. 43, fol. 137).

b. That as to two classes of these members the assessment was outside of the jurisdiction, (Tr., pp. 43-44, fols. 137-139), and therefore without authority and contrary to the Fourteenth Amendment, (Complaint, Tr., p. 43, fol. 137); Assignment of Errors in State Court, (Tr., p. 4, fol. 57).

c. That the taxation here on ("money" and "credits") was not only unequal as to similar institutions, (Tr., p. 43, fol. 137), but was a second taxation upon the corporate assets to all of the assessed conditional value of $3,500, except $678.61, (Tr., pp. 42-3, fols. 135-8); Assignment of Errors State Court, (Tr., p. 4, fols. 57, errors 4, 11), and therefore contrary to the said amendment.

d. The admitted facts in this case, for taxation on a different theory without statutory authority, were ignored while they should have been controlling as to this case, (see opinion in this case, Tr., p. 9, fol. 66; opinion in McPhail case, Tr., p. 9, fol. 67).

e. The discrimination as alleged in the complaint in this case is admitted by the demurrer, while the court decides the discrimination in the Duluth case upon that record which it treats as being opposite to this record on this fact.

It is therefore evident from the record, that the case was decided upon its merits without the privilege of pleading over on the demurrer, (Tr., p. 46, fol. 142), that that decision was sustained against all of the Federal questions we here make and that the final judgment was entered upon it, (Tr., pp. 1-2, fols. 51-52).

EFFECT OF DECISION ON DEMURRER.

This then being a decision on general demurrer, with no privilege of pleading over, the question arises as to what the effect of the fact is.

The rule in the Supreme Court of Minnesota is the same as the rule of this Court:

That a judgment upon general demurrer without the privi-

lege of pleading over is a judgment upon the merits with the same effect as a verdict.

Carlin v. Brackett, 38 Minn. 307.
Dohs v. Holbert, 103 Minn. 283.
N. P. Ry. Co. v. Slaght, 205 U. S. 122.

In the Slaght case, supra, *this Court* said:

> "It is well established that a judgment on demurrer is as conclusive as one rendered upon proof."

GENERAL QUESTIONS.

Starting then, with the truth of the facts of the complaint thus established, and involved in the Assignment of Errors to be urged, we find, among others, the following general questions to answer:

1. Is there essential statutory law in Minnesota that is capable of including this tax, without an arbitrary and wholly unwarranted decision that would violate that due process of law and equal protection secured by the Fourteenth Amendment to the Federal Constitution?

2. Do the Minnesota statutes, taken as delimited by the decision in the McPhail case, 124 Minn. 398, supra, lack the fundamental legislative elements for taxing authority, and therefore lack that due process of law and equal protection secured by the Fourteenth Amendment to the Federal Constitution.

3. Was it Due Process of Law or equal protection under that amendment to make the decision on "Money and Credits" here, by merely ignoring the distinction and deciding the case by reference to the McPhail case?

4. Was it Due Process of Law or equal protection under that amendment to ignore the distinction of residence and decide this case by reference to the McPhail decision?

5. Does taxation of these memberships, whether as a second tax upon the corporate assets, or as a tax upon the privileges of membership while others similarly situated are allowed to escape taxation entirely, make such an arbitrary exercise of the assumed power as to violate the principle of equality of laws, due process of laws or privileges and securities secured by the Fourteenth Amendment to the Federal Constitution?

The Assignment of Errors in the State Court was in no way abandoned, as will appear from the facts and legal hisory set out in that court as a

STATEMENT OF FACTS (IN STATE COURT), (SEE TR., PP. 5-8).

"This action was originally brought by Col. Rogers against the county officials to cancel all assessments of membership in the Chamber of Commerce and to restrain their enforcement (P. B. F. 33) upon the theory of testing the question of whether they were taxable and thus preventing 550 otherwise necessary defences (Fol. 28).

"A restraining order was obtained (Fol 6); a demurrer interposed to the complaint (Fol. 37); the motion for a temporary injunction and the trial of the demurrer were heard together (Fol 39); the court dissolved the restraining order, denied the temporary injunction, and sustained the demurrer (Fol. 40-41).

"There was then some question in the minds of counsel as to whether this sole plaintiff was truly representative of each of the three classes of members, and to settle that, the amendments were made to add the other two defendants, as representing the state members outside of Minneapolis (Fol. 30), and the non-resident members living in other states (Fol. 30), respectively the court approved the amendment and left the order standing.

"The complaint was drawn with a view of fairly setting forth the facts to reach the question by demurrer (Fol. —); after the demurrer was sustained a motion for judgment was granted (Fol. 46); the judgment was entered against the plaintiffs that they take nothing by the action, and that costs be granted the defendants (Fol 47), and it was so entered (Fol. 49).

"Thus we have a judgment upon the merits that no cause of action exists on the facts admitted by the demurrer. In short, those facts are:

"(1) That the Chamber is a corporation in the nature of a voluntary association (Fol 10):

"Similar in principle, organization, conduct, control, and relations among its members, to the relations of membership and control in churches, social clubs, fraternal societies, the Associated Press and voluntary business associations generally."

"(2) That it has no capital stock; transacts no business for profit; that it owns buildings to rent for offices to its members; and controls the relations of its members in their dealings on its grain exchange (Fol. 11).

"(3) That its members transact business for themselves and their customers and not for it, (Fol. 12); that

no use for profit is made of the membership except by the member (Fol. 18).

"(4) That the memberships are subordinate to its rules and regulations for admission, control, liens, penalties, agreement to abide by the rules, agreement to give up many of his legal rights in operating upon the floor, and only acquired membership subject to the will of the members generally, and to such rules and regulations as they, or a majority of them, prescribe (Fol 15).

"(5) That a membership certificate is issued to better regulate admission, control and disposition of the memberships; that to get a membership the member must not only be elected, but he must agree to be bound by the Charter, Rules, Regulations and Customs, as conditions precedent to the sale and transfer of the membership to him; that when a membership applicant passes all these qualifications, and not until then, he gets a certificate which he can only transfer by the same processes and on the same conditions (Fol. 17).

"(6) That when the assessment was made the memberships were selling at $3,500.00 (Fols. 20 and 22): "that said value was entirely a contingent one and conditioned upon the rules and regulations for acquisition, control and disposal as above set forth, and did not represent property that could be acquired, controlled or disposed of except with the consent and subject to the regulations of said association outside of legal obligations."

"(7) That if they had been unqualifiedly worth $3,500.00, and the memberships above the proportionate value of the assets which were fully taxed had been assessed, they would have been $678.61 each (Fol. 21).

"(8) That they do not represent ownership, except as the memberships in the other enumerated associations do (Fol. 18).

"(9) That the assets of the Chamber were all fully taxed (Fol. 18).

"(10) That the members were each assessed as 'moneys and credits' as if property in the general sense and as if the corporation had not been taxed (Fol. 25): "that the membership in the Associated Press, lodges, fraternal orders, churches, etc., were not taxed in said city, although standing in a similar position; and a discrimination was thereby made, not only unlawfully, but prejudicially as against this plaintiff and the other five hundred forty-nine (549) members of said association by unequally assessing them and taking their property without due process of law, contrary to the state and federal constitutions."

"(11) That appearance was duly made before the Boards of Equalization to cancel said taxes, or, failing in that, to reduce the taxes to $678.61; that those Boards were inclined to grant the application, apparently, but

upon taking legal advice in each instance, were advised that the courts should be asked to determine whether this was taxable property (Fol. 27).

"(12) That the county was threatening to enforce these taxes against the individuals and 550 defenses would be required, which would make an unnecessary multiplicity of litigation for the city, county and state as well as the parties (Fols. 28-29).

"(13) That the plaintiff Crandall is a resident of Mankato, Blue Earth County, and joins in the bill on behalf of himself and all other members residing in the state outside of Minneapolis, at the locations given, and compose in all fifty-eight (58); that the plaintiff Goetzman is a resident and citizen of Wisconsin and joins for himself and all other members who are non-residents of Minnesota, of which there are fifty (50); that the certificates of memberships are kept at their respective residences, and the non-resident memberships are not operated, except in rare instances in the state of Minnesota, but are confined to the benefits which the members get by having other members buy or sell grain for them, at one-half of what the regular commission to outsiders would be (Fol. 32).

"The following applicable things appear in the legal history of the state:

"(14) Chapter 138 of the General Laws of Minnesota, 1883, under which the Chamber exists, provides:

" 'It may prescribe the terms and conditions of its membership, the mode of admission of members, * * *'

"This law provides for the sort of a private institution which has grown up.

"This act also provides that:

" 'whenever by it deemed necessary, may raise money for the purposes of the corporation by assessments upon the members thereof; and the payment of such assessments may be enforced by a sale or forfeiture of the membership of any member failing to pay the same, in such manner as the by-laws or rules may provide; but the aggregate of all assessments made in any one (1) year, shall not exceed the sum of one hundred dollars ($100.00) upon each member, unless a majority of the members of the corporation shall vote in favor of such extra assessment.'

"It is also provided by this act that:

" 'Said corporation may inflict fines upon any of its members, and collect the same, for breach of its rules, regulations of by-laws; said fines may be collected by action of debts before a justice of the peace, or in any court of record having jurisdiction of the amount of the fine, in the name of the corporation, or by temporary suspension or permanent removal from membership, or removal from office therein.'

"Indeed, in the case of Evans v. Chamber of Commerce, 86 Minnesota, 448, being an action against this very association, this court laid down the rule that these memberships were subject to self-imposed conditions and were not property in the general sense, saying:

" 'Clearly, under these statutory provisions, the association had the right to make membership conditional upon a submission to arbitration of business disputes arising between its members, and the rules in question went no farther than this.'

"The court points out that this membership was gotten upon these conditions and that as expressed in some of the cases, such a membership is 'clogged with conditions,' and then says, at page 453:

" 'This is nothing new or novel, for such conditions are annexed to membership in many societies or associations, social, fraternal and religious. In these organizations, as well as in defendant association, membership subject to conditions is optional, not compulsory. All members became such voluntarily, stipulating, to conform to the by-laws or to submit to expulsion, which is nothing but a self-inflicted exclusion from membership rights and privileges.'

"The scheme of organization here is not that of a general corporation, but in the nature of an association, based upon personal privileges as distinguished from property interests and rights. Consequently, a membership is not property in the general sense; it lacks the element of the right of admission, the right of use, and the right of transfer, subject only to the laws of the land, as is usual in property. This is not, as this court has said, 'new or novel,' but is in accordance with Chapter 37 of the General Laws of 1881, under which the Chamber of Commerce was organized. The statute provides, among the powers of incorporation, that it

" 'may by resolution or by-law prescribe the terms and conditions of membership in and the mode of admitting members;'

"This, of itself, shows that the memberships are made upon terms and conditions, and that they are not intended by the statute to be sold or transferred, except according to terms and conditions. This statute must be taken in connection with the history of the subject, and the nature of the organization under which it was made, not only in this state, but in other states.

"In the case of McCarthy Bros. v. Chamber of Commerce, 105 Minnesota 497, this court, speaking through Mr. Justice Elliot, said:

"In pursuance of its statutory and inherent powers to make proper rules and regulations for its government and operation (Evans v. Chamber of Commerce, of Minneapolis, 86 Minnesota 448, 91 N. W. 8), the chamber adopted the rule which we have quoted, which enables

business firms and corporations to acquire membership for the purposes therein stated. In no other way can a corporation become a member of the chamber. As said of a similar co-organization in American v. Chicago, 143 Ill. 210, 32 N. E. 274, 18 L. R. A. 190, 36 Am. St. 385, it had 'an undoubted right to adopt this rule, and as it prescribes the mode and the only mode in which membership in the exchange can be obtained, no one can justly claim to be a member who has not been admitted in the mode thus prescribed.

"There is no right of collateral or outside purchase recognized by this chamber.

"In short, the Chamber pays full taxes upon everything which it owns; there is no capital stock; the state assesses these memberships upon the theory that they represent this property already once fully taxed, and that they also represent privileges of an intangible nature none of which can be posessed, used or conveyed or given away as would be essential to the rights of property, but they are singled out of this general class arbitrarily, and taxed while other similar memberships in other associations go free."

JURISDICTION.

The jurisdiction of this court is invoked to protect the plaintiffs against the adverse decision of the Federal rights and privileges so claimed.

SPECIFICATION OF ERRORS UPON WHICH PLAINTIFFS IN ERROR RELY.

"The said petitioners, plaintiffs in error, for writ of error from the Supreme Court of the United States to the Supreme Court of the State of Minnesota in the above entitled proceedings, by Mercer, Swan & Stinchfield, their attorneys, at the same time with the presenting and filing of their petition for writ of error in the above entitled proceedings, state that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Minnesota, in the above entitled matter, there are manifest errors, in this:

1. That there is not now, nor was there in 1912, any statutory authority in Minnesota for taxing members in such associations as the Chamber of Commerce of Minneapolis upon their memberships in such association; that the taxing of such members for their memberships for the year 1912 as shown herein, was and is without authority and takes the property of the plaintiffs without due process of law, contrary to Section I, Article XIV of the Amendments to the constitution of the United States.

2. That there is not now, nor was there in 1912, any statutory authority in Minnesota for taxing members in such associations as the Chamber of Commerce of Minneapolis upon their memberships in such association; that the taxing of such members for their memberships for the year 1912 as shown herein, was and is without authority, and denies to the plaintiffs equal protection of the laws secure dto them by Section 1 of the XIV Amendment to the constitution of the United States.

3. That there is not now, nor was there in 1912, any statutory authority in Minnesota for arbitrarily segregating such memberships as those of the plaintiffs in said association from those of all other similar organizations, such as named in the complaint and taxing those of the plaintiffs while all others of a similar class were not taxed, as was done in this proceeding, that such arbitrary and unwarranted taxation amounted to taking the property of the plaintiffs without due process of law, contrary to Section I of Article XIV of the Amendments to the constitution of the United States.

4. That there is not now, nor was there in 1912, any statutory authority in Minnesota for arbitrarily segregating such memberships as those of the plaintiffs in said association from those of all other similar organizations, such as named in the complaint and taxing those of the plaintiffs, while all others of a similar class were not taxed, as was done in this proceeding; that such arbitrary and unwarranted taxation amounts to a fraud-of the laws secured to them by the Fourteenth Amendment to the constitution of the United States.

5. That the taxing officers and the courts of said state have no authority in law or equity for allowing or upholding taxation of any property or any interest in property, except such authority as is given by statute; that the tax here imposed is held under nominal cover of a wholly unwarranted and arbitrary statutory construction, leaving as it does, the tax in question standing without authority of statutory, or other, law and thereby takes the property of the plaintiff's without due process of law, contrary to Section I of the XIV Amendment to the constitution of the United States.

6. That the taxing officers and the courts of said state have no authority in law or equity for allowing or upholding taxation of any property or any interest in property, except such authority as is given by statute; that the tax here imposed is held under nominal cover of a wholly unwarranted and arbitrary statutory construction, leaving as it does, the tax in question standing without authority of statutory, or other, law and thereby denies to the plaintiffs equal protection of the laws secured to them by Section I of the XIV Amendment to the constitution of the United States.

7. That said court had not statutory authority, or

other authority, for refusing to allow the statutory definition as to taxable personal property to be applied to the memberships of these plaintiffs in said association and to hold that they were taxable outside of the statutory provisions, and that by so doing it denies plaintiffs due process of law, contrary to Section I of Article XIV of the Amendments to the constitution of the United States.

8. That said court had no statutory authority, or other authority for refusing to allow the statutory definition as to taxable personal property to be applied to the memberships of these plaintiffs in said association and to hold that they were taxable outside of the statutory provisions, and that by so doing it denies to the plaintiffs equal protection of the laws secured to them by Section I of the XIV Amendment to the constitution of the United States.

9. That said court erred in holding that a classification could be made, without statutory authority, as it was made by the taxing officers here, between the memberships in this association and those in other similar associations of the kind described in the complaint, and not be a denial to the plaintiffs of the equal protection of the laws secured to them by Section I of the XIV Amendment to the constitution of the United States.

10. That said court erred in holding that a classification could be made, without statutory authority, as it was made by the taxing officers here, between the memberships in this association and those in other similar associations of the kind described in the complaint, and not be a denial to the plaintiffs of due process of law, contrary to Section I of the XIV Amendment to the constitution of the United States.

11. That the taxing statutes of Minnesota, as delimited here, permitted and required the taxing of such memberships in an arbitrary manner by the assessors outside of the statutory definition of personal property, and outside of any classification or method of taxing, based upon any legal authority, and amounted to a taking of the property of the plaintiffs without due process of law, contrary to Section I of Article XIV of the Amendments to the constitution of the United States.

12. That the taxing statutes of Minnesota, as delimited here, permitted and required the taxing of such memberships in an arbitrary manner by the assessors outside of the statutory definition of personal property and outside of any classification or method of taxing, based upon any legal authority, and denies to these plaintiffs the equal protection of law secured to them by Section I of the XIV amendment to the constitution of the United States.

13. That under the facts of the complaint, as admitted by the demurrer, the unwarranted classifications according to the state practice, are found as facts and those

findings are undisturbed by the said Supreme Court; that the taxation in this case became and is a question of law and equity outside of the rules applied in the case of State v. McPhail; that to hold that this case is ruled by that denies to the plaintiffs in this case due process of law, contrary to Section I of the XIV Amendment to the constitution of the United States.

14. That under the facts of the complaint, as admitted by the demurrer, the unwarranted and unequal classifications according to the state practice, are found as facts and those findings are undisturbed by the said Supreme Court; that the taxation in this case became and is a question of law and equity outside of the rules applied in the case of the State v. McPhail; that to hold that this case is ruled by that denies to these plaintiffs equal protection of the law secured to them by Section I of the XIV Amendment to the constitution of the United States.

15. That taxing, in Minneapolis, members of said association, residing outside of Minnesota, upon their said memberships, is a taking of their property without due process of law, contrary to Section I of the XIV Amendment to the constitution of the United States.

16. That taxing, in Minneapolis, the members residing in Minnesota, outside of Hennepin County, upon their said memberships, is a taking of their property without due process of law, contrary to Section I of the XIV Amendment to the constitution of the United States.

17. That the taxation, in Minneapolis, of members residing outside of Minnesota, upon their said memberships in said association, violated the rule of equal legal protection secured to them by Section I of the XIV Amendment to the constitution of the United States.

18. That the taxation, in Minneapolis, of the members residing in Minnesota, outside of Hennepin County, upon their memberships in said association, violated the rule of equal legal protection secured to them by Section I of the XIV Amendment to the constitution of the United States.

19. That the statutory provisions of said State under which said taxation was made, as construed and delimited herein, make a system of taxation for these plaintiffs upon said memberships that is unjustly and arbitrarily discriminatory as against them and in favor of members in other similar organizations of the same class in said State, and denies to these plaintiffs the equal protection of the laws under Section I of Article XIV of the Amendments to the constitution of the United States.

20. That the statutory provisions of said state under which said taxation was made, as construed and delimited herein, made a system of taxation for these plaintiffs upon said memberships that is unjustly and arbitrarily

discriminatory as against them and in favor of other members in similar organizations of the same class in said State, and denies to these plaintiffs due process of law, contrary to Section I of the XIV Amendment to the constitution of the United States.

21. That the holding that said complaint did not state a cause of action within the provisions of Section I of Article XIV of the Amendments to the constitution of the United States as to due process of law, itself amounts to a denial of due process of law.

22. That the holding that said complaint did not state a cause of action within the provisions of Section I of Article XIV of the Amendments to the constitution as to legal protection, itself amounts to a denial to these plaintiffs of the equal protection of the laws secured to them by Section I of Article XIV of the Amendments to the constitution of the United States.

23. That said state of Minnesota has made and enforced a law herein which abridges the privileges and immunities of the plaintiffs as citizens of the United States, contrary to Section I of Article XIV of the Amendments to the constitution of the United States."

ARGUMENT.

PLAN OF ARGUMENT.

We desire to argue this cause under five general propositions, raised from different angles by the Specification of Errors. In the applicable sense we wish each line of argument to apply to the Errors argued under each subdivision, because the essential overlapping decisions of the questions makes it impossible to divorce the questions entirely; so without intending to waive the force of any applicable argument to any particular error, and to avoid repetition we shall subdivide the argument under specific errors as follows:

I.

Errors 1, 3, 5, 7, 8, 10, 11, 13, 15, 16, 20, 21, 22, 23, are argued together under the theory that

The statutes of Minnesota furnished no sufficient authority for assessing the memberships in question and this assessment was without due process of law or equal protection as secured by the Fourteenth Amendment.

II.

Errors 5, 6, 8, 12, 13, 14, 21, 22, 23, are argued together upon the theory that they each raise, from different angles the question of whether the state statutes as delimited by the McPhail decision left either due process of law or equal protection as against the Fourteenth Amendment.

III.

Errors 2, 5, 6, 7, 8, 10, 12, 13, 14, 21, 22, 23, are argued together upon the theory that they challenge the authority to tax as herein made, (upon "Money and Credits") by reference to the McPhail case, by ignoring the distinctive and controlling facts, contrary to said amendment.

IV.

Errors 11, 15, 16, 17, are argued together upon the theory that there was no statutory authority for taxing such memberships in Minneapolis as against the classes situated either outside of the county or the state, contrary to said amendment.

V.

Errors 1, 2, 4, 6, 8, 9, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, are argued together upon the theory that they raise the question as to whether the taxation and decision amount to that unjust and arbitrary discrimination which violates due process of law, equal legal protection and the privileges and immunities secured by said amendment.

I.

ERRORS 1, 3, 5, 7, 8, 10, 11, 13, 15, 16, 20, 21, 22, 23.

WE CONTEND THAT THERE WAS NO STATUTORY AUTHORITY FOR TAXING THESE MEMBERSHIPS IN MINNESOTA, BECAUSE THE ESSENTIAL REQUIREMENTS FOR SUCH TAXATION HAD NEVER BEEN PROVIDED BY LEGISLATION OF ANY SORT.

We appreciate that public burdens must be met; that fair and just taxation is essential to the maintenance of self-government; and that reasonable classification to that end ought to be accorded to the state and to officers acting in its name

in the exercise of what can reasonably be deemed public statutory duties; but liberality is not license. It does not destroy the fundamental fact that the Federal Constitution was intended to safeguard property, as well as persons, from the arbitrary or unlawful taking, whether by public or private agencies, under the guise of taxation not equally or relatively imposed upon the class similarly situated, or not authorized by statutory authority, even under cover of public duty.

In Board of Commissioners v. King, 67 Fed. 202 (8 C. C. A.) the Court, speaking through *Judge Caldwell*, says:

> "The power to raise money by taxation is the highest attribute of sovereignty. It is a power absolutely essential to the existence of civil government. * * * When properly exercised, it is the protection and defense of the state and the security of the citizen; but history shows that it may be converted into the most powerful engine of injustice and oppression and used to deprive the citizen of his property rather than protect him in its enjoyment."

In the Topeka case (87 U. S. 655) the opinion was delivered by Mr. Justice Miller. The question there was over the right to pass a statute which authorized towns to contract debts which would impose the levy of taxes in aid of a private purpose. It was there said:

> "Of all the powers conferred upon government that of taxation is most liable to abuse."
> Citizens Sav. & Loan v. Topeka, 87 U. S. 655.

It is equally true that caution in the exercise of this great power must be observed.

DOUBTS SHOULD HAVE BEEN RESOLVED IN FAVOR OF PLAINTIFFS.

This Court, in Treat v. White, 181 U. S. 264, said:

> "Certainly there must be some satisfactory reason for departing from the general rule of construction. It is also true, as said by this court in United States v. Isham, 17 Wall. 496, 501, 21 L. Ed., 728, 730. 'If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption,' because, in the language of Pollock, C. B., in Gurr v. Scudds, 11 Exch. 191, 'a tax cannot be imposed without clear and express words for that purpose.' With that proposition we fully agree. There must be certainty as to the mean-

> ing and scope of language imposing any tax, and doubt in respect to its meaning is to be resolved in favor of the *taxpayer*."

It is the fundamental rule that the "Power to tax is the power to destroy," and that there is a legitimate way to exercise the right, the unlawful extension of which can easily reach despotic power; that there must be certainty as to the power to tax or the language claimed as authority therefor must be construed against those seeking to act under it—doubts must be resolved in favor of the taxpayers.

In all this controversy, no body, official, court or counsel, has pointed out to us any statutory authority that can be said to clearly or even intentionally compose the fundamental elements, for such taxation as was here made, on the basis of "Money and Credits" yet none has been willing to resolve the doubt in favor of the taxpayer.

RULES OF INTERPRETATION.

Before examining the Minnesota statutes as to their effect, when taken with the state construction, let us look at the simple rules of interpretation:

1. That in ordinary questions of interpretation this Court takes the taxing statute as delimited by the state decisions in tax cases.

2. That this Court will make its own interpretation of state laws for the purpose of determining whether the rights secured by the Federal Constitution have been invaded.

3. That when it is charged that the state has violated Federal rights by decisions that are so unwarranted as to be of arbitrary effect, this Court then examines the system, not for ordinary judicial errors outside of Federal law, but to see if the decision is of the kind that is so unwarranted as to violate the due process and equal protection principles of the Federal Constitution.

4. The operation and effect of the whole state scheme, as substance, not form, must be considered.

In the last analysis, this is another way of saying in later cases that the judgment of a state court may be taken into consideration, together with the legislative acts and constitutional

provisions to determine whether Federal Constitutional rights have been violated; if this were not so, the state court would stand above the Constitution of the United States in the determination of whether the constitutional rights claimed have been violated by state agencies whenever the decision would come under the form of interpretation of constitution or statutes where the decision, by silence, fails to pass upon questions argued, or decides them by reference to other cases dissimilar in nature and fundamental principles. Such a question, of course, should be raised with that caution due to the respect which should be accorded to decisions of appellate courts, but if the right to raise it exists, then the privilege of exercising that right can be raised with as much respect to the highest court of the state as the challenge can be made in any other appellate court as against a court of inferior jurisdiction. We hope, therefore, that we may treat the question entirely upon its merits without any cause for suspicion that we intend to charge the appellate court of Minnesota with anything more than the sort of a decision which we challenge as being so unwarranted as to violate the Federal rights as to this particular case.

1. DELIMITS OF STATE STATUTES.

In the case of Clement Nat. Bank v. Vermont, 231 U. S. 120 (L. Ed. 147), this Court had under consideration the semi-annual tax imposed by Vermont statutes upon interest bearing deposits in national banks. Upon a decision from the Supreme Court of Vermont, Mr. Justice Hughes, expressed the rule in the following language:

> "It was the province of that court to determine what the terms of the statute authorized, commanded, or forbade and it is for this court to say whether, in view of its operation, thus delimited, it conflicts with the Federal law." Clement Nat. Bank v. Vermont, 231 U. S. 120, L. Ed. 147, at 155.

2. THE DUTY OF UPHOLDING THE FEDERAL CONSTITUTION IS GREATER THAN THAT TO UPHOLD STATE LAWS OR STATE CONSTRUCTION.

Undoubtedly it is the general rule that as to taxing statutes, upon ordinary questions, the interpretation of the highest

court of the state is controlling, but this rule seems to have those exceptions that are necessary to enable the Federal Constitution to be enforced. Speaking for the court, in Lewis v. Monson, 151 U. S. 544 (L. ed. 265), Mr. Justice Brewer said:

> "The determination of any questions affecting them is a matter primarily belonging to the courts of the state, and the national tribunals universally follow their rulings except in cases where it is claimed that some right protected by the Federal Constitution has been invaded."

In speaking again for that court in McCullough v. Virginia, 172 U. S. 102 (L. ed. 382), where the question under consideration was the coupon legislation of Virginia, Mr. Justice Brewer said:

> "It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could with fidelity to the Constitution of the United States follow the construction of the Supreme Court of a state in such a matter, when it entertained a different opinion. The doctrine thus announced has been uniformly followed. Bridge Proprietors v. Hoboken Land & Improv. Co. 1 Wall. 116, 145 (17:571, 576); Wright v. Nagle, 101 U. S. 791, 793 (25: 921, 922); McGahey v. Virginia, 135 U. S. 665, 667."

3. IT IS AS POSSIBLE TO INVADE THE RIGHTS OF DUE PROCESS OF LAW AND EQUAL PROTECTION SECURED BY THE FOURTEENTH AMENDMENT, THROUGH THE JUDICIAL, AS THROUGH ANY OTHER, DEPARTMENT OF THE STATE.

It does not follow that, because a court has gone through all the forms of law, the parties have had the sort of decisions which may be fairly said to be adjudications as a matter of constitutional law. If, as we think, a decision of the highest court of Minnesota upon this question has lacked that consideration which failed to sufficiently grasp the applicable facts and apply legislative and judicial principles as they existed, so as to give to these members the benefits of the laws of the state and protection from the invasions of state action, without statutory authority therefor, then no decision under the guise of interpretation can be held to satisfy the Federal Constitution as to due process of law or equal protection; for, if a state decision deprives a litigant unlawfully of his rights,

it is as much an adverse action on behalf of the state as if it were done by any other department of the state.

> Fayerweather v. Ritch, 195 U. S. 276 (L. Ed. 193);
> C. B. & Q. v. Chicago, 166 U. S. 224 (L. Ed. 979);
> Citizens Sav. & Loan Ass'n v. Topeka, 87 U. S. 655 (L. Ed. 461).

In the Fayerweather case, supra, this Court said:

> "Although these plaintiffs were parties to the proceedings in the state courts, and presented their claim of right, if it be true that the necessary result of the course of procedure in those courts was a denial of their rights—a taking away and depriving them of their property without any judicial determination of the fact upon which alone such deprivation could be justified,—a case is presented coming directly within the decision in 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581. Giving effect in the circuit court to the state judgment does not change the character of the question. It is simply adding the force of a new determination to one wrongfully obtained and adding it upon no new facts."

As said in the Burlington case, and requoted in the Fayerweather case:

> "Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form."

4. TAKING THE WHOLE STATE SCHEME OF TAXATION INTO ACCOUNT, THE SUBSTANCE, AND NOT THE NAME OR FORM, MUST BE THE CONTROLLING TEST IN THE OPERATION AND EFFECT OF THE LAW.

In Galveston, etc. Ry. v. Texas, 210 U. S. 217-227, it is said:

> "A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect."

In St. L. & S. W. Ry. Co. v. State of Arkansas, 235 U. S. 350-362, the Court said:

> "But when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution the decision is not dependent upon the form

in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state."

In Choctaw v. Gulf R. R. Co., 235 U. S. 292, it is said, at page 298:

> "Neither state courts nor legislatures by giving a tax a particular name, or by the use of some form of words, can take away our duty to consider its real nature and effect. Galveston, Harrisburg & San Antonio Ry. v. Texas, 210 U. S. 217, 227."

ESSENTIAL AUTHORITY TO TAX.

In the light of these principles, let us review the constitutional essentials to a valid taxation, so far as they are here involved:

1. *Legislative authority to tax essential prerequisite.*

In re City of Chicago, 61 Fed. 897, Judge Seaman says, at page 899 (7 C. C. A.):

> "The power of taxation is legislative, and not judicial. Its exercise is not a judicial act, in any ordinary sense, 'and it cannot be exercised otherwise than under the authority of the legislature.' Meriweather v. Garret, 102 U. S. 472; Rees v. Watertown, 19 Wall. 107; Heine v. Commissioners, Id. 655; Upshur Co. v. Rich, 135 U. S. 467, 10 Sup. Ct. 651; Cooley, Tax'n, 43."

In Meriweather v. Garrett, 102 U. S. 472, this Court, speaking through Mr. Chief Justice Waite, said:

> "The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature."

In Citizens Sav. & Loan v. Topeka, 87 U. S. 655, Mr. Justice Miller said:

> "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments."
>
> Citizens Sav. & Loan v. Topeka, 87 U. S. 655 (L. Ed. 455), at 461.

In Board of Commissioners v. King, 67 Fed. 202 (8 C. C. A.) Judge Caldwell said:

> "The people of this country have studiously confined the exercise of this delicate and vitally important power to their immediate representatives. Nor have they been willing to entrust their representatives with its unlimited exercise, but have imposed on them constitutional restrictions and limitations in its exercise. They have at all times refused to confer it in any measure or degree on the executive or judicial departments of the government. Under our system of government, therefore, the power to tax is a legislative function exclusively, and cannot be exercised except in pursuance of legislative authority. * * * A court has no taxing powers, and can impart none to the county authorities."

Applying this rule—that plain legislative authority to tax must exist and cannot be granted by the judicial or executive deparments, it is interesting to note that the power to tax these interests is at least doubtful, and the mode of assessment and listing, as it seems to us, are wholly wanting in this class of interests, although the general scheme of taxation of property interests to be taxed is a complete one in Minnesota.

1-2. *Assessment involves both listing and valuation according to statutory method.*

In L. R. & F. S. Ry. Co. v. Worthen, 120 U. S. 97 (588), the Court said:

> "The assessment of property, that is, the appraisement and estimate of its value, is the basis upon which the amount of the tax is fixed."

In People of State, etc. v. Weaver, 100 U. S. 539 (707), it is said:

> "This *valuation*, then, is part of the *assessment* of taxes. It is a necessary part of every assessment of taxes which is governed by a ratio or percentage. There can be no rate or percentage without a valuation. This taxation, says the Act, shall not be a greater rate than is assessed on other moneyed capital. What is it that shall not be greater? The answer is taxation * * *
>
> " 'An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. As the word is more commonly employed, an assessment consists in the two

> processes listing the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them. * * * Taxation by valuation cannot be apportioned without it.' Cooley, Tax., 258, 259; Burroughs, Tax., p. 198, sec. 94. So, also, Judge Bouvier defines assessment to be determining the value of a man's property or occupation for the purpose of levying a tax. Determining the share of a tax to be paid by each individual. Levying a tax. 1 Bouvier, 151."

In Witherspoon v. Duncan, 4 Wall. 210 (339), the Court said:

> "Of course, the property must, under the compact, be taxable; but if it is, the mode of enforcing payment of taxes is wholly within legislative control."

In Williams v. Board of Supervisors, 122 U. S. 154 (1088), it is said:

> "The power of taxation vested in the legislature is, with some exceptions, limited only by constitutional provisions designed to secure equality and uniformity in the assessment. The mode in which property shall be appraised, by whom its appraisement shall be made, the time within which it shall be done, what certificate of their action shall be furnished, and when parties shall be heard, for the correction of errors, are matters resting in its discretion."

In other words, both the listing and the valuation depend upon legislative authority for the power and mode of assessment.

As a fundamental basis of all taxation three prerequisites exist:

1. There must be legislative authority for taxation and assessment of the particular kind of property, whether absolute property, or conditional interests in property, are to be taxed.

2. There must be legislative authority for an official listing of that particular kind of property.

3. There must be legislative authority for an official estimate of the value of that particular kind of property to constitute a basis for an assessment and apportionment of a tax between the individual subjects of taxation within the district.

Of these simple and fundamental rules it seems to us there can be no dispute. And it is the contention of the plaintiffs that the statutes of Minnesota as delimited by its decisions

lack every one of these fundamental elements as a basis for this taxation. It is true that the Minnesota court means to hold in the McPhail case, supra, that the state constitution placed a legislative duty as to the first of these, but of this we shall see more later.

WHAT MINNESOTA HAS DONE TO MEET THESE FUNDAMENTALS.

The State of Minnesota and its legislature have well understood this, and on property intended to be taxed, have provided for these fundamentals of

1. The authority to tax.
2. The listing of taxable property.
3. The valuation of the listings of taxable property wherever taxation has been intended, but not for such taxation as here imposed.

But, as the state never intended to tax such memberships at all, and especially as "money and credits," it does not provide for these fundamentals as to them.

II.

ERRORS 2, 5, 6, 7, 8, 10, 12, 13, 14, 21, 22 and 23.

THE STATUTES OF MINNESOTA AS DELIMITED BY THE DECISION IN THE McPHAIL CASE, 124 MINN. 398, LACKED THE FUNDAMENTAL LEGISLATIVE ELEMENTS FOR AUTHORITY TO TAX THE MEMBERSHIPS HEREIN, AND THEREFORE THE DECISION IN THIS CASE DOES NOT COMPLY WITH THAT DUE PROCESS OF LAW OR EQUAL PROTECTION SECURED BY THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

The statutes with the decision of the state court added do not furnish the basic constitutional requirements for

a. Taxing memberships in corporations, or
b. Taxing such memberships as "Money and Credits."

In addition to what we have formerly said as to the necessity for legislative authority to tax, we call attention to part of the language of the Eighth Circuit Court of Appeals in Board of Com'rs v. King, 67 Fed. 202-4, as follows:

> The people of this country have studiously confined

> the exercise of this delicate and vitally important power to their immediate representatives. Nor have they been willing to entrust their representatives with its unlimited exercise, but have imposed on them constitutional restrictions and limitations in its exercise. They have at all times refused to confer it in any measure or degree on the executive or judicial departments ofthe government. Under our system of government, therefore, the power to tax is a legislative function exclusively, and cannot be exercised except in pursuance of legislative authority. * * *

a. PROVISIONS FOR TAXING CORPORATIONS AND INTERESTS IN THEM.

Article 9, Section 3, of the Constitution of Minnesota, as it stood prior to the amendment of 1906, had this provision:

> "3. Property subject to taxation—Laws shall be passed taxing * * * all real and personal property, according to its true value in money; * * *."

An amendment to the Minnesota Constitution in 1906, to take the place of that section, and three other sections of that article, was adopted, providing as follows:

> "Power of taxation—Legislature may authorize.—
> "Section 1. The power of taxation shall never be surrendered, suspended or contracted away. Taxes shall be uniform upon the same class of subjects. * * *"

And as the constitution now stands there is no requirement that the legislature *shall pass laws taxing all real and personal property* as was the case prior to that amendment; but it is only now provided that the *power to tax shall not be surrendered* and the *power to tax shall not be suspended*, and that the *power to tax shall not be contracted away*, and that the *taxes shall be uniform on the same class of subjects*. In other wards, the requirement formerly existing in the constitution that the legislature *should* pass laws taxing all property, no longer exists. It is now left to the *discretion* of the legislature, provided that the tax which it imposes upon the same *class of subjects* shall be *uniform*. *And it has not attempted to tax this class of subjects specifically.*

Section 794 of the Revised Laws, 1905, provides:

"Property subject to taxation—All real and personal property, * * * is taxable * * *"

Section 797 provides:

"PERSONAL PROPERTY DEFINED—Personal property for the purposes of taxation, shall be construed to include:" *Then follow eleven general classifications, no one of which covers such memberships.*

Of this statutory definition the Minnesota court, in State v. McPhail, supra, said:

> "Were it not for section 797, it would be clear that the assessment and levy by the proper officers of a tax on such a membership would be justified. Section 797 names eleven specific classes of personal property, in no one of which is by name, included Board of Trade memberships. So far as here material, its language is as follows: 'Personal property shall be construed to include: (1) All goods, chattels, moneys, and effects.' Then followed ten other particular classes of property."

And again:

> "We think it should not be held that section 797 was intended to describe all personal property that was subject to taxation. The language of the section does not compel such a conclusion. 'Shall be construed to include,' does not necessarily mean 'shall only include.' The section was not intended to be restricted, but rather to help define what was meant by 'all personal property' as that term is used in section 791."

And again:

> "We hold that section 797 was not intended to contain a statement of all personal property subject to taxation, and that the fact that Board of Trade memberships do not come under any of the eleven classes does not mean that they are not to be taxed."

Consider then for a moment that the power to tax must be based upon legislative authority. What is that authority as left by that decision? That the memberships should be taxed. But how?

The opinion in the McPhail case reaches the conclusion that, although clogged with conditions, the memberships are still property, notwithstanding the definitions in the dictionaries, and decided cases, that they were "properly taxable"—that is, that the legislature had the power to tax them.

The opinion then admits:

> "It was necessary for the legislature to exercise the power given, and to perform the duty imposed, by passing laws."

This expression of necessity for legislation accords with the Federal decisions hereinbefore given.

The Court then reviews the general language of many taxing laws which existed during the growth of the legislation of the state and concludes that if the legislature itself had not defined personal property by Section 797 of the Revised Laws of 1905, a tax would be justified. The Court held that the failure to come within that definition *did not exclude* the memberships from taxation as property. Irrespective of whether this decision is unfounded on the merits because such conditional interests are not "property" in the general sense, let us examine what is left of the system, if these memberships had been taxed under that theory. We do not understand that this element is really controlling, but call attention to what is left of that system to show that it is inapplicable to any basis for such assessment as was made under "Money and Credits" herein; and to show that, neither corporations nor associations nor any interest in them had any statutory basis for such taxation, as here imposed.

Section 816 of the Revised Laws of Minnesota for 1905 provides:

"LISTING PERSONAL PROPERTY—By whom listed—Personal property shall be listed in the manner following:

> "1. Every person of full age and sound mind, being a resident of this state shall list all his moneys, credits, bonds, shares of stock of joint stock or other companies or corporations (when the property of such company or corporation is not assessed in this state), moneys loaned or invested, annuities, franchises, royalties, and other personal property."

Section 838 of the Revised Laws of 1905 is as follows:

> "SEC. 838. **Corporations companies and associations generally**—The president, secretary, or principal accounting officer of every company and association, incorporated or unincorporated, etc. * * * when listing personal property, shall also make out and deliver to the assessor a sworn statement of the amount of its capital stock, setting forth particularly:

1. The name and location of the company or association.
2. The amount of capital stock authorized, and the number of shares into which it is divided.
3. The amount of capital stock paid up.
4. The market value, or, if they have no market value, then the actual value, of the shares of stock.
5. The value of its real property, if any.
6. The value of its personal property.
7. The total amount of all indebtedness, except the indebtedness for current expenses, excluding from such expenses the amount paid for the purchase or improvement of property.

The aggregate amount of the fifth and sixth item shall be deducted from the total amount of the fourth item, and the remainder, if any, shall be listed as 'bonds or stock,' under section 835, subd. 23. The real and personal property of each company or association shall be listed and assessed the same as that of private persons. * * *"

It will be noticed that the scheme of this section is to tax shares of corporate stock to the corporation in such way as to get the benefit for the state of their value, after deducting the value of the other assets of the corporation; but this section is clearly not meant to cover memberships in voluntary associations. It does show that the assets were not to be doubly taxed.

Section 835 of the Revised Laws of 1905 is as follows:

"Assessor to value—Items of list—The assessor shall determine and fix the true and full value of all items of personal property included in such statement, and enter the same opposite such items, respectively, so that, when completed, such statement shall truly and distinctly set forth: * * *.

"23. The amount and value of bonds and stock other than bank stock.

"24. The amount and value of shares of bank stock.

"25. The amount and value of shares of capital stock of companies and associations not incorporated under the laws of this state."

Then follows a list covering articles like furniture, improvements where they are no part of the real estate, dogs, etc. Then subdivision 30 says:

"30. The value of all other articles of personal property not included in the preceding items."

We see that listing is provided here for capital stocks of companies and associations. It is clear that it was never

meant to cover corporations having memberships, but only such associations or corporations as issue stock, for a careful analysis of the statute reveals the fact that the associations that issue stock under the statute are the kinds that do business for profit, and those that issue memberships are not the kind that do business for profit.

See Rev. Laws, 1905, Secs. 3068-3113. See 3112-13 in Appendix hereto.

Indeed, it is manifest throughout the statute that corporate *memberships* as distinguished from corporate *stock* are in no manner covered by the statute. It is further manifest that the whole scheme of legislation has been to allow corporations and associations doing business for profit to issue stock, and the taxing laws evidence intention to tax that stock, but in every sort of voluntary association it is manifest that there was no expectation that profits would be earned, and no disposition to tax.

It is further borne out by observation that neither the definition, nor the listing, nor the method of determining value, was so constructed as to allow any method of appraisement or assessment as a basis for the tax upon such memberships.

The statutory scheme in Minnesota seems plain, from what has been said.

Under the plain words of the statute (see sections in Appendix hereof), Sec. 794, Rev. Minn. 1905:

> "All real and personal property * * * is taxable."

(It does not say that interests less than property shall be taxed.)

Section 794 of the same revision gives the legislative definition of

> "Personal property for the purposes of taxation."

This definition does not cover such subject as is here taxed, and the Minnesota Supreme Court so holds in State v. McPhail, 124 Minn. 398.

What does this leave as to listing and valuation of these?

Under subdivision 1 of Section 816, the listing for taxation is only required of

> "shares of stock of joint stock or other companies or cor-

> porations (when the property of such company or corporation is not assessed in this state.")

The property of the chamber was fully assessed in the state, (Tr., p. 42, fol. 135).

Under Section 838, the officers of corporations and associations are required to list the assets, the debts, the market, or actual, value of the stock so that the total value of the assets will then be deducted from the value of the stock and the difference is then listed as

> "bonds or stock" under Section 835, Subdivision 23.

This leaves it clear that the intention of the legislature was to assess only stock corporations or associations, and to assess the assets but once, and the good will as "bonds and stock under Subdivision 23 of Section 835, and not under Subdivision 30 of that section.

The certificates cannot be assessed under the provision for assessing stock in corporations for they are not stock, (Tr., p. 41, fol. 132). No other plan of listing or method of value is contained in the statute to enable the taxing officers to reach or properly assess, or value anything else in, or growing out of, any domestic corporation except the general clause in Section 838.

> "The real and personal property of each company or association shall be listed and assessed the same as that of private persons."

But without treating this as controlling corporations, we find that Section 835 requires the assessor to determine and fix the value of the items inthe list. The list includes

> "The amount and value of bonds and stock other than bank stock."

The statement or list that is to be valued item by item under Sec. 816 is to be of

> "moneys, credits, bonds, shares of stock of joint stock or other companies or corporations (when the property of such company or corporation is not assessed in this state)", or the corporate list as provided in Section 838.

The plain fact is that what were Sections 1521 and 1530 in the prior statutes, so far as here material, are the same (except the form) as in the 1905 Statutes as 835 and 838, and the

Minnesota Supreme Court held, in State v. Duluth Gas & Water Co., 76 Minn. 96-103, that they must be construed together; that the method then provided in 1530, later in 838, for listing corporate intangible property was:

> "to be the exclusive method of listing and taxing the property of all corporations and companies following within the purview of that section."

It is difficult to see how the legislature or the court could have left the scheme plainer for taxing stock corporations, or how it could, with less silence, have left out the memberships in other than stock corporations, entirely.

The complaint in this case alleges (Tr., p. 41, fol 132), and the general demurrer (Tr., p. 45, fol. 141), has the effect of admitting:

> "That said corporation has no capital stock and is not a stock corporation."

It is not surprising, therefore, that three assessments, if attempted at all, should be made against the memberships, one against those in the Duluth Board and two against those of the chamber, each upon a different theory as to what should be the basis for assessment, or the method of arriving at the value—*they had no statutory rules to guide.*

With these memberships excluded from the statutory definition by the Court, and excluded from the plan of listing of corporate stock, there remained no provision for any method of determining their valuation such as is required as a statutory basis.

b. THE MINNESOTA STATUTES AFTER THE DECISION HAD NO PLAN TO JUSTIFY TAXATION AS "MONEY AND CREDITS," TO UPHOLD THIS ASSESSMENT.

The Supreme Court of Minnesota assumed, that its decision as to the McPhail case settled this matter, without deciding this question (Tr., p. 9, fol. 66).

Let us look then at the "Money and Credits" statute to find what it means. It was Chapter 285 of the General Laws of Minnesota for 1911, (see Appendix hereto).

It is interesting to note that this chapter treats "Money and

Credits" as defined by Section 798, Revised Laws 1905, which is

> "1. 'Money' or 'moneys' shall mean gold and silver coin, treasury notes, bank notes, and other forms of currency in common use, and every deposit which any person owning the same, or holding in trust and residing in this state, is entitled to withdraw in money on demand.
>
> "2. 'Credits' shall mean and include every claim and demand for money or other valuable thing, and every annuity or sum of money receivable at stated periods, due or to become due, and all claims and demands secured by deed or mortgage, due or to become due."

The language of this section excludes the possibility of such memberships coming within that definition.

2. This plan includes a sort of confidential list in Chapter 285, Revised Laws 1911. The list must be in the manner provided in Section 876 of the Revised Laws of 1905. How the value shall be fixed upon the lists being voluntarily made does not appear, except that the "moneys" and "credits" are to be separately listed o na separate set of boks, and a penalty of 50 per cent is added in the estimate, if no voluntary list is made, and the assessor is left to act on his best information.

The duties of the assessor are made to conform to Section 858, Revised Statutes 1905, which would mean at its true value; but there is not the slightest shadow of a provision that we have found that fixes any legislative rule or mode of reaching a rule that could enable the assessor or the court to bring such memberships under

a. The definition of "moneys" or "credits."

b. The listing of "moneys" or "credits."

c. Any method of valuation to equitably arrive at the amount of tax on a basis to make it equal or equitable, throughout the district.

There is, then, no legislative authority enabling the memberships to be taxed, listed, assessed, or valued as "money or credits."

Applying hereto the rules as to the necessity for clear statutory authority to tax, to list and to value, as given hereinbefore, we find that assessments must have statutory authority which is plain, and that doubts must be resolved in favor of the

taxpayer. This is the reasonable rule for it is not right to have a taxing system admittedly construed for thirty years as not taxing such memberships and then let them, to the exclusion of all others, be taxed in various ways because nobody could tell for certain that they were taxable, or if so, upon what theory or basis.

The Court reached the conclusion in the McPhail case that Subdivision 30 of 835 allowed the Duluth memberships to be valued by the assessor as "all other articles of personal property"—not limiting it to the meaning of either "articles" or "other such articles."

Taking this statute with the assumption that such construction was justified for assessments as general personal property, we find, that its use is excluded because this listing and consequently this sort of valuation is prohibited by the statute now under consideration. It is true that Section 816 of the Revised Laws of 1905 requires "money and credits" to be listed, and 835 requires the assessor to fix the value of the items in the list under 835, and that Subdivisions 19-25 of Section 835 provide for the listing of money and credits as follows:

> "19. The amount of moneys of banks (other than those whose capital is represented by shares of stock), bankers, brokers, or stockjobbers."
> "20. The amount of credits of banks (other than those whose capital is represented by shares of stock), bankers, brokers, or stockjobbers."
> "21. The amount of moneys other than of banks, bankers, brokers, or stockjobbers."
> "22. The amount of credits other than of banks, bankers, brokers, or stockjobbers.
> "23. The amount and value of bonds and stocks other than bank stock.
> "24. The amount and value of shares of bank stock.
> "25. The amount and value of shares of capital stock of companies and associations not incorporated under the laws of this state."

It requires but a glance to show that these provisions were not intended to cover such things as these memberships and Subidision 30 is not in Chapter 285, which provides for the taxation of "money and credits."

In other words:

1. The "money and credits" taxable as such are those

defined in Section 798 of the Revised Laws of 1905 by the express provisions of Chapter 285, G. L. 1911. By no possible construction could they include these memberships, and consequently no legislative power for their taxation as such exists, and the Minnesota court has avoided saying so.

2. The valuation listing must be separate from the list required under Section 835, Revised Laws of 1905, by express provision in Section 10 of Chapter 285, G. L. 1911, and the listing must be by Section 8 of the same chapter, as follows:

> "Property taxable under this act shall not be included in the valuation list which assessors are required to make under the provisions of section 835, Revised Laws of 1905, but shall be listed in a separate book or in a supplement to the regular assessment book which the county auditor shall provide for each assessor on or before the first day of May each year.
>
> "This book, supplement, shall show the total amount of 'money' and of 'credits' assessed to each taxpayer under the provisions of this act, and shall not disclose further details of his assessment. It shall contain also a summary showing the number of individuals, firms, association, trustees, etc., assessed for such property and the total amount of 'money' and 'credits' taxable under the provisions of this act. When making the return to the county auditor provided for by section 850, Revised Laws of 1905, the assessor shall file this valuation book, or supplement, together with the summary of the same and the listing blanks filled out by each taxpayer assessed under the provisions of this act.
>
> "The county auditor, when compiling the returns required by section 862, Revised Laws of 1905, shall include, under a separate heading the aggregate assessment in each district of property assessed under the provisions of this act."

So that there is no stautory authority for listing such memberships as either money or credits, or for listing "money or credits" under "Section 30," and the Minnesota court does not say that there was.

3. As to the "money and credits" that are assessable under that chapter, the person owning them is required to list and that list is to be taken as true except as to value, unless he refuses to answer reasonable and necessary inquiries; but if he does not list, the assessor lists and values on his own information and adds 50 per cent as a penalty.

It is also clear that this was never intended to be a dragnet for listing memberships in corporations, and the Minnesota court avoids saying that it was.

It seems to us, therefore, that the upholding of this decision on the basis of "money and credits" by reference to the McPhail case, is so utterly devoid of statutory or other basis as to be a mere arbitrary judicial foreclosure of the qyestion without statutory authority therefor.

Feyerweather v. Ritch, 195 U. S. 27 (Law Ed. 193).

III.

ERRORS 5, 6, 8, 12, 13, 14, 21, 22, 23.

THE STATE STATUTE AND THE McPHAIL DECISION LEFT NO SUFFICIENT STATUTORY BASIS FOR THE TAXATION HERE, AS "MONEY AND CREDITS," AND CONSEQUENTLY THE DECISION ITSELF VIOLATES THE FOURTEENTH AMENDMENT.

While the Minnesota Supreme Court decided this case by reference to the McPhail decision, yet it is apparent from the opinion in the McPhail case (Tr., p. 10, fol. 66), that the court decided that case, and consequently this one, upon the McPhail record. This is evident from the argument in the McPhail case, and the two decisions (Tr. pp. 9, 16, fols 66-79), as well as the assignment of errors and statement of facts in the Supreme Court of Minnesota (Tr., p. 35, fols. 56-66), and the complaint herein (Tr., pp. 11-14, fols. 132-139), which shows that the basic and controlling facts are so different that a decision of the McPhail case could not possibly control the decision in this case as to the fundamental elements:

a. That the statutory definition of "money and credits" could cover these memberships.

b. That there was any statutory method provided for listing them as "money and credits," or

c. That there is any statutory method by which these memberships could be valued, as "money and credits" on a statutory rule or method.

The Court evidently concluded to dispose of the Duluth case and let this one follow it without any attempt to justify

the decision as applied to this short and undisputed record. The Court took the Duluth record and the memorandum of the trial judge, to a large extent, as the principal basis of its opinion.

The Duluth case, State v. McPhail, 121 Minn. 392, is distinguishable on the facts, but the nearest adverse case.

To meet the attitude of that case squarely, it holds the *privileges of membership* to be taxable as personal property, but does not pretend to say that they are "money and credits." Fundamentally that decision is distinguishable from this case because:

(a) It treats those memberships as being of a certain values, notwithstanding the conditions (Tr., p. 11, fol. 70), while our value is entirely subject to the conditions (Tr., p. 43, fol. 136).

(b) It treats those memberships as capable of transfer as collateral, or passing by will, or descent, or by operation of law, and only having restrictions in ownership and use, which probably increase the value (Tr., p. 12, fol. 72), while here the value is all subjected to those things (Tr., p. 43, fol. 136).

(c) It taxes the privilege features alone without a retaxation of the assets (Tr., p. 16, fol. 79), while our case makes a taxation upon the privileges and a second assessment upon the physical properties, by taxing the membership generally without deducting the physical assets, already taxed, (Tr., p. 43, fol. 136).

(d) It makes no attempt to decide the questions dependent upon residence.

(e) It did not decide the question of whether they were "money or credits."

It takes no account of the finding of discrimination here, which is not in the Duluth findings, and which is found by it not to be in that case.

Coming then to the comments of the Supreme Court of Minnesota in State v. McPhail, we find it says:

> *"It is confidently asserted by defendant that the authorities in other states are uniform to the effect that a seat or membership in a Board of Trade or Sock Exchange cannot be taxed. This is not quite true, as we*

shall point out; but it is not to be denied that, in every case that has arisen in this country directly involving the question, the membership has escaped taxation. Mayor, etc., of Baltimore v. Johnson, 96 Md. 737, 54 Atl. 646, 61 L. R. A. 568; Thompson v. Adams, 93 Pa. St. 55; City & County of San Francisco v. Anderson, 103 Cal. 69, 36 Pac. 1034, 42 Am. St. 98; People v. Feitner, 167 N. Y. 1, 60 N. E. 265, 82 Am. St. 698."

If this were an argument on the merits of the case started in the Federal Court before the decision in the McPhail case, and which is to be argued upon jurisdictional grounds alone, then, we should endeavor to show, and we believe could almost demonstrate by the authorities, that the questions there raised were raised at such a time, and on such facts, as would compel the Federal Court to pass upon the merits of the statutory construction, or want of taxing statutes, and would come with controlling force to a court having the power of decision left to the Federal Court in line with the binding authorities.

The cause of action here created and brought was before that decision, and as we view the law, it was the duty of the Federal Court to decide the merits of the statute, as well as the constitutional questions.

It seems to us to be the clear rule now that the Federal Court had a right to pass upon this question, on its own judgment, under the circumstances, as to the interpretation of the statute.

Merritt v. American Steel B. Co., 79 Fed. 228 (8 C. C. A.);
Northrup v. Columbian Lumber Co., 186 Fed. 770-82 (9 C. C. A.);
Burgess v. Seligman, 107 U. S. 20 (L. Ed. 359);
Hardin v. Jordan, 140 U. S. 371 (L. Ed. 428);
Carroll County v. Smith, 111 U. S. 556 (Law Ed. 517);
Loeb v. Trustees, 179 U. S. 472 (L. Ed. 280);
Great Southern Hotel v. Jones, 193 U. S. 532 (L. Ed. 778);
Hunt v. N. Y. Cotton Exc., 205 U. S. 322;
Kuhn v. Fairmont Coal Co., 215 U. S. 349;
Aetna Life Ins. Co. v. Moore, 231 U. S. 544.

The language of the taxing statute with its historical development both as to practical construction and the decisions

passing upon the meaning of the word used as "property" and those excluding conditional interests in property are not cited here, because the question is not, from that standpoint, within the control of this court, as we view it, on the "money and credits" decision.

At least, the constitutional questions raised on that record were open. We speak of this more by way of incidental argument, however, because we could only bring that opinion to this court, to show that neither it nor the statute upon which it is claimed to be based pretend to make any taxing system for taxing "money and credits" as general personal property, because Chapter 285 of the General Laws of Minnesota, 1911, which authorizes the assessment of "money and credits," provides in Section 10:

> "Property taxable under this act shall not be included in the valuation list which assessors are required to make under the provisions of Section 835, Revised Laws of 1905, but shall be listed in a separate book or in a supplement to the regular assessment book," etc.

It seems to us that the decision in the McPhail case, if in any way treated as a decision of "money and credits," does what this court said it could not itself do. In speaking of the question of construction of plain language, where legislation might have been enacted limiting the question, this court said, in James v. Bowman, 190 U. S. 127-141:

> "'This would, to some extent, substitute the judicial for the legislative department of the government * * * to limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.'"

If this position be correct, or if this case was, as we think, decided in disregard of these questions, then, the language of this court in Fayerweather v. Ritch, 195 U. S. 276-298, (speaking of a Federal claim of want of due process under the Fifth Amendment because of the effect given in a Federal Court to a state decision), is applicable, where it said:

> "It is said that the right of these plaintiffs to share in the estate of Daniel B. Fayerweather is undoubted, unless destroyed by the releases they executed; that the fundamental question presented in the trial court of the

> state was the validity of those releases; that, notwithstanding this, that court came to its conclusion and rendered its judgment without any determination thereof; that the appellate courts wrongfully assumed that the trial court had decided the question, and rendered their judgments on that assumption, so that the necessary result of the proceedings in the state courts was a deprivation of the right of the plaintiffs to a share of the estate without any finding of the vital fact which alone could destroy their right. The contention is not that the state courts erred in their finding in respect to this fact, but that there never was any finding. Such decision of the state courts, made without any finding of the fundamental fact, was accepted in the circuit court of the United States as a conclusive determination of the fact. Although these plaintiffs were parties to the proceedings in the state courts, and presented their claim of right, if it be true that the necessary result of the course of procedure in those courts, was a denial of their rights,—a taking away and depriving them of their property without any judicial determination of the fact upon which alone such deprivation could be justified,—a case is presented coming directly within the decision in 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581."
>
> Fayerweather v. Ritch, 195 U. S. 276.

The controlling questions were not decided here.

Looking then, at these taxes from the standpoint that the state system is to be reviewed for the fundamentals, we find, as it seems to us, that the first element, a definition, the second element, listing; third element, valuation, are each entirely wanting for such memberships, to treat them as "money and credits." There is no method of determining either the method or the amount of the tax, and the definition does not cover them.

Enough is written here to demonstrate this from the fact that in State v. McPhail, 121 Minn. 398, the opinion of which is in the Record (Tr., pp. 10-16) herein, the tax was upon the supposed surplus of the corporate memberships above the value of the assets, while in *this* case, the taxes were for "money and credits" on an entirely different percentage and without deducting the corporate assets from the memberships (Tr., pp. 42-43). And in case 111, to be argued herewith, these same memberships are taxed upon the theory that they are personal property, but without deducting the value of the cor-

porate assets (see transcript i ncase 411, p. 5, fol. 7). The Duluth case is improperly assumed to have the same facts and to be of the same merit. If it were the same in fact, the three different assessments by as many different assessors and boards, shows, under the circumstances, that either the law or its administration, or both, are at fault; if there is no law which can be interpreted to cover such memberships, then those whose duty it is to decide and apply it are at fault, and if there is no law capable of an interpretation to cover such interests, then those who seek to apply, or affirmatively decide it are acting arbitrarily and at fault, constitutionally speaking.

Here then was a case with fundamental, distinctive and controlling facts, needing application; they were not disputed, but simply ignored. It is difficult to see how this rule could ever be applied, if not in a case like this.

That decision could hardly satisfy due process of law even as to the Duluth case. But whether it satisfied the demands of the Fourteenth Amendment as to that case, it certainly laid no foundation for this case, upon "money and credits."

IV.

ERRORS 11, 15, 16, 17, 20, 21, 22, 23.

THESE PROCEEDINGS ON BEHALF OF MINNESOTA PARTICULARLY DENY TO EVERY MEMBER RESIDING OUTSIDE OF MINNEAPOLIS AND HENNEPIN COUNTY, AND THE STATE, DUE PROCESS OF LAW, AND TAKE THEIR PRIVATE PROPERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION.

a. Section 1 of the Fourteenth Amendment to the federal constitution provides:

> "No state shall make or enforce any law which shall * * * deprive any person of life, liberty or property without due process of law."

A similar provision is found in Section 7, Article 1, Constitution of Minnesota.

Section 13 of Article I provides against taking their prop-

erties for public use. Such tax is a personal claim. If not authorized by law, the collection of the tax is in violation of this provision.

The result is, to take their taxes *without* legal authority—arbitrary, as distinguished from due process.

See County of Lyons v. Lien, 105 Minn. 55.

What was Section 820, *Revised Laws* 1905, *but is now* 1998 *of the Revised Statutes* 1913, *reads*:

> "Personalty—Where listed—Except as otherwise in this chapter provided, personal property shall be listed and assessed in the county, town or district where the owner, agent, or trustee resides."

These memberships to the extent of those where the members reside outside of the City of Minneapolis (Tr., p. 44, fol. 139) were not assessable in Minneapolis in any event.

Section 834 of the Revised Laws of 1905 is as follows:

> "Where listed in case of doubt—In case of doubt as to the proper place of listing personal property, or where it cannot be listed as in this chapter provided, if between places in the same county, the place for listing and assessing shall be determined by the county board of equalization, and, if between different counties, or places in different counties, by the state auditor; and, when determined in either case, shall be as binding as if fixed hereby."

This cannot apply here because there is no doubt about the residence of any of these parties, nor is there any doubt under the bill of the fact that these memberships were held at their respective residences (Tr., p. 45, fol. 141).

The result would be to make each member, whether resident or non-resident, pay in Minnesota on both the assets and the membership; while all others of a similar class of other corporations escaped entire taxation on their memberships (Tr., p. 43, fol. 137).

See State v. Nelson, 107 Minn. 319.

It was not within the jurisdictional province of Minnesota to assess those beyond its border, and that would violate the due process clauses.

Union Ref. Tr. Co. v. Kentucky, 199 U. S. 194;
L. & J. Ferry Co. v. Kentucky, 188 U. S. 383;

Del. L. & W. Ry. Co. v. Penn., 198 U. S. 342;
Joslyn v. Distilling Co., 11 Minn. 183;
State v. Nelson, 107 Minn. 319.

In the Union Ref. Company case this court said:

> "It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power."

This is a simple proposition; if the taxation of the memberships is double taxation within the state then that is discriminatory, because there is no authority for it; if the memberships are to be, as they were, taxed upon the theory that the taxation of the assets is immaterial because the membership itself is all that is to be considered, then there was no statutory authority for assessing those who lived and kept the memberships in their outside home counties, or those who resided and kept their memberships in their home states, as was alleged (Tr., p. 44, fol. 139), for that would be outside of the territorial limits, and the assessment would not be due process of law.

V.

ERRORS 1, 2, 4, 6, 8, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23.

THE EQUALITY CLAUSE AS TO TAXATION IN THE MINNESOTA CONSTITUTION AND THE GENERAL EQUALITY CLAUSE IN BOTH STATE AND FEDERAL CONSTITUTIONS IS VIOLATED BY THIS ASSESSMENT BY THE STATE OF MINNESOTA; IT IS NOT DUE PROCESS.

It is evident from the complaint that an action in this matter was not deemed necessary because it was hoped that the Duluth case would be broad enough to stop the attempt (Tr., p. 44, fol. 138), and that the hurried complaint did not cover the question as much in detail as it does in the case in the Federal Court, No. 411, to be argued herewith; but enough appears from the complaint to show that the assessment was not inadvertent or accidental as to this kind of conditional property or memberships, but that it was intentional and systematic as to this assessment and as to the failure to similarly assess all others of the same class.

FACTS OF INEQUALITY.

With respect to the nature of the Chamber of Commerce, its membership and the taxation and discrimination, the following facts appearing in the complaint are admitted by demurrer and must be taken as true:

1. The complaint alleges (Tr., p. 41, fol. 132):

> "That he is now and for about thirty years last past has been a member of the Chamber of Commerce of Minneapolis, an institution incorporated under Chapter 138 of the General Laws of Minnesota for the year 1883, that said institution is a corporation in the nature of a voluntary association similar in principle, organization, conduct, control, and relations among its members, to the relations of membership and control in churches, social clubs, fraternal societies, the Associated Press and voluntary business associations generally."

2. The complaint then sets up facts to show that the admission to membership and the use of the membership and the disposition of the membership are all subject to the rules, regulations and conditions to which the members agree in writing when they become members (Tr., p. 42, fol. 134), and that the membership certificates were issued under these conditions, and alleges:

> "That the said memberships do not represent the ownership of property in said association except simply in the way that memberships in such organizations as above described would represent property in equity."

3. The complaint alleges:

> "That the said Chamber of Commerce of Minneapolis as a corporation owns buildings and personal property for the carrying on of its business as aforesaid, all of which have been fully and completely taxed in the city of Minneapolis, county of Hennepin and State of Minnesota for the year 1912; and said corporation has no property that has not been fully taxed, and it has no good will that produces any profit to it, or that is attempted to be used for profit to it; that no one of such memberships is used for profit except by the individual member, and then his profit depends entirely upon the use to which he puts the membership."

4. The complaint then sets up that in the case of closing out of the association, the memberships would have no value above the assets already fully taxed to said association; that if the buildings and property already taxed had been deducted,

the valuation would have been but $678.61 with this allegation:

> "That if the total number of memberships had then been counted as representing the property of said corporation, and they had been of the value of $3,500.00 unqualifiedly, and the assessment made against the buildings and other property of said corporation had been deducted on the basis of the value assessed, so as to have left the net equity in such memberships on the basis of the then contingent sale price, six hundred seventy-eight dollars and sixty-one cents ($678.61), would have been all that was left for property not otherwise taxed to said association, and the value of said sale price except in the last named above is based upon the assets already taxed; that said value was entirely a contingent one and conditioned upon the rules and regulations for acquisition, control, and disposal, as above set forth, and did not represent property that could be acquired, controlled or disposed of except with the consent and subject to the regulations of said association outside of legal obligations." (Tr., p. 43, fol. 136.)

5. The complaint alleges:

> "That for about thirty (30) years, and during the whole period of the life of the law under which said organization was created, this association and others in the state of Minnesota of similar kind have existed and paid their taxes upon their assets in the regular way, and it has constantly been the construction of the laws of taxation throughout the state until the year 1912 that such memberships, like those of lodges, fraternal orders, churches, that of the Associated Press, etc., were not and are not taxable under the laws of Minnesota." (Tr., p. 43, fol. 136.)

6. The complaint also alleges:

> "That there are five hundred and fifty (550) members of said association, similarly situated to this plaintiff, except that the names and residences of the owners of such membership, as they appeared upon May 1, 1912, as the date on which said assessment was made were as specified in the attached list, which is marked 'Exhibit A' and hereby made a part hereof, and this action is brought on behalf of all of them, and they were each taxed by the taxing officials of the city of Minneapolis upon said memberships at the rate of thirty-five hundred dollars ($3,500.00) apiece for the year 1912, under 'Moneys and Credits,' just as if the assets of the corporation had not been taxed and as if such memberships were property in the general sense; that the membership in the Associated Press, lodges, fraternal orders, churches, etc., were not taxed in said city, although

> standing in a similar position; and a discrimination was thereby made, not only unlawfully, but prejudicially as against this plaintiff and the other four hundred forty-nine (449) members of said association by unequally assessing them and taking their property without due process of law, contrary to the state and federal constitutions." (Tr., p. 43, fol. 137.)

In other words, a uniform construction for thirty years had been that no corporations of this class were assessable as to memberships. After the assessment had been made as it had been made for thirty years, this corporation was singled out and its memberships were taxed without deducting the proportion which the assets of the corporation would bear to the proportionate sale price of the memberships; that memberships of the Associated Press and others standing in a similar position were not taxed; that this was not only unlawful, but prejudicial against these members and unequal as to them, and took their property without due process of law.

Application was made to the equalization boards, but they decided that it might be a question of sufficient doubt that the courts should pass upon whether or not these memberships, under the circumstances, were property which could be reached by the taxing laws. The complaint then sets up that the defendants threatened to, and will, unless restrained, immediately place those taxes upon the records and proceed to attempt to enforce them and that five hundred fifty prosecutions and defenses would follow, etc., etc.

It is thus evident that this tax was upon a different basis, upon a different theory from that which the McPhail case shows was adopted there, and the assessment in the Federal case is upon still a different theory. In this case, therefore, the assessment adopted was not only different from the membership of the Duluth Board of Trade which the Minnesota court treats as similar, but was a full reassessment of all the corporate property, while all other corporations of the class of associations and their stock were wholly excluded from such tax upon their memberships, and consequently the second taxation upon their property. The equalization boards, on advice of counsel, declined aid to allow the courts to decide the question. This discrimination suddenly followed the re-

versal of a uniform construction for thirty years, that none of the memberships of such association were taxable, and in spite of the constitutional provision of the state, that uniformity of the same class of subjects should be observed,—there is no uniformity in assessing the assets of one corporation once, and those of another twice. It was more than that; they were assessed under pretended statutory provisions so uncertain that the taxing officers did not know whether they were assessable, or if so, how they should be listed or their value determined, and with no guidance as to how the assessment should be made to keep from reassessing the corporate assets already fully taxed to the corporation, while no such reassessment was made of other corporate assets of associations of the same class, or of corporations generally.

In short, there is no escape from the conclusion that here was an assessment that placed an undue burden upon the memberships of this association, and through them, upon the assets of the association not placed upon other corporations of the same, or any other, class.

The demurrer admits it, but the Supreme Court ignores that admission and decides the question on an opposite conclusion of fact, which it draws from evidence of the Duluth case not applicable here.

a. STATE v. McPHAIL DOES NOT APPLY THE FACTS OF THIS CASE TO THE RULE OF EQUALITY.

The case of State v. McPhail, 124 Minn. 398, says:

> "The members of the board are not required to pay taxes on the physical and tangible property of the board, nor does the board pay taxes upon the intangible rights which constitute the value of a membership."

It is evident at once that this rule is not a decision of this case, because the controlling facts here are that the corporate assets were once fully taxed (Tr., p. 42, fol. 135). Also in this case the levy was on a valuation of $3,500, while the privileges of membership outside of taxable property, fully taxed, represented, conditionally, $678.61 (Tr., p. 43, fol. 136).

Certainly if stockholders were assessed in this way it would be double taxation.

In State v. Nelson, 107 Minn. 319-323, it was said:

> "The taxation of the stock of a corporation and of its

> property in the same state may be admitted to be double taxation, for a certificate of stock in a corporation in its last analysis is simply the evidence of the holder's interests in the property of the corporation."

In the case of Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 342 (L. Ed. 1077), this Court said:

> "This court has also frequently held that a tax on the value of the capital stock of a corporation is a tax on the property in which that capital is invested, and in consequence no tax can thus be levied which includes property that is otherwise exempt."

Yet the McPhail case finds no constitutional invasion.

Like the point of "moneys and credits" and that of taxation outside of the county and outside of the state, this was presented to the Supreme Court of Minnesota (Tr., p. .., fol. ..), and by it ignored. It was necessary to a decision to make Due Process and equal Protection.

Fayerweather v. Ritch, 195 U. S. 276 (L. Ed. 193).

b. BOTH THE MINNESOTA CONSTITUTION AND THE XIVTH AMENDMENT TO THE FEDERAL CONSTITUTION, PROHIBITS AN INTENTIONAL AND DELIBERATE DISCRIMINATION IN TAXATION THAT IS SUBSTANTIALLY UNFAIR.

a. EQUALITY UNDER STATE LAW.

Of course the state law is valuable here to see whether there is a complete system that has not been wrongfully used as against the Federal Rights.

It is provided by the amendment in 1906, now known as Section 1, Article 9 of the Constitution of Minnesota, that:

"Taxes shall be uniform upon the same class of subjects. * * *"

In State ex rel. Mudeking v. Parr, 109 Minn. 147, the Supreme Court of Minnesota held a peddlers' license act void as against this provision, saying at page 152:

> "While removing some of the former restrictions on the methods of taxation, the amendment to article 9 of the constitution (chapter 168, p. 216, Laws 1905), specifically prescribes that taxes shall be uniform upon the same class of subjects. The legislature is not required to provide for the taxation of occupations; but if such a course is pursued, and any occupation is selected for that purpose, then the burden must fall equally upon

> the members of the class. Mutual Benefit Life Ins. Co. v. County of Martin, 104 Minn. 179, 116 N. W. 572. The occupation or class designated by the act is that of peddling. Some peddlers are taxed while others are exempt and for the reasons above stated the law cannot be sustained as a tax measure, any more than as police regulation."

The members of all that class of voluntary associations discussed herein, except in Grain Exchanges, are not taxed. The memberships in the Associated Press and other business associations of exactly the same nature and class are not taxed.

The general equality clause in the Minnesota Bill of Rights is:

> "No member of this state shall be * * * deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers."
>
> Art. 1, Sec. 2, Const. of Minn.

In State v. Cudahy Packing Co., 103 Minn. 419, the opinion on reargument says, page 424:

> "It does not appear in this record that this defendant has been discriminated against."

Again, the court said, at 426:

> "It is elementary that, while a tax law must aim at equality, approximation to equality is all that can be had. Cooley, Tax'n (1st Ed.) 127; Davis v. City, 55 Iowa, 549, 8 N. W. 423. Absolute equality is not possible."

And again at 427:

> "It is entirely clear that in this case no attempt whatever was made to discriminate between different classes of property owners. The same rule applied indifferently to residents and non-residents."

So that it is the rule of Minnesota that if the tax upon memberships be treated as taxes upon occupations and assets then the Duluth memberships are only taxed upon the privilege or the occupation while these are taxed also upon the portion representing the corporate assets. This is not equality.

c. THE FEDERAL DECISIONS, OUTSIDE OF THIS COURT, PROHIBIT SUCH TAXATION.

In Central R. Co. of New Jersey v. Mayor, etc., of Jersey City et al, 199 Federal, 237, the court had under consideration

the charge that in the year 1899 and subsequent years to and including 1906, the defendants, a municipal corporation, and its officers, individually and systematically under-valued taxable property of individuals and others in the city except in a few isolated instances of property owned by railroad companies and other corporations adjoining the railroad yards, at from 45 per cent to 70 per cent of the true value of the properties, and at the same time over-valued certain third-class railroad properties. There was not much denial of the facts apparently upon the record, and the District Court said:

> "As to it, it is sufficient to say that it clearly established a well-defined, a systematic, plan persistently carried out by the city assessors, whereby they intentionally grossly underassessed the property of others within the city, and cast upon complainant a greater burden of taxation than its lawful and just share. This practice was in disregard of the constitutional mandate that 'property shall be assessed for taxes under general laws and by uniform rules according to its true value' (N. J. Const. art. 4, sec. 7, par. 12), and the general laws framed to effect such tax laws (3 Gen. Stat., N. J., 1895, pp. 3282, 3344, and P. L. 1903, p. 394), and is such a denial of the equal protection of the laws guaranteed by the fourteenth amendment to the Constitution of the United States as to require this court to take jurisdiction and relieve the complainant from the unjust part of the proposed tax, regardless of the absence of diverse citizenship, or that a state court of equity has jurisdiction in the premises (Cohens v. Virginia, 6 Wheat. 264, 5 L. Ed. 257; Cummings v. National Bank, 101 U. S. 153, 158, 25 L. Ed. 903; Pittsburgh Cin., Ch. & St. L. R. Co. v. Backus, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031; First National Bank of Toledo v. Treas. Lucas Co. (C. C.) 25 Fed. 749; Taylor v. Louisville & N. R. Co. 88 Fed. 350, 372, 31 C. C. A. 537; Louisville Trust Co. v. Stone, 107 Fed. 305, 46 C. C. A. 299; Chicago Traction Co. v. Raymond (C. C.) 114 Fed. 557, affirmed in Raymond v. Chicago Traction Co. 207 U. S. 20, 37, 38, 28 Sup. Ct. 14, 52 L. Ed. 90; Atchison, T. & S. F. Co. v. Sullivan (supra), unless as contended by defendant, an adequate remedy at law exists for the correction of such grievance or the subject-matter thereof are res judicata, or the complainant is barred from maintaining its suit by laches. Central R. Co. of New Jersey v. Mayor, etc., of Jersey City et al, 199 Fed. 237."

In Detroit, etc., Ry. Co. v. Fuller, 205 Federal, 86, the court had under consideration the question of certain Michigan taxes under certain Public Acts. It seemed that Act Number 35, im-

posed certain specific taxes upon the stock, bonds, and other indebtedness of certain specially chartered railway companies doing business in Michigan. It was claimed by the holders of some of those bonds that the taxes should be enjoined and at page 89, the court said:

> "Act. No. 95, in seeking to impose a tax only upon the stock, bonds, and other evidences of indebtedness of specially chartered railway companies, is, in the opinion of the court, an arbitrary singling out of the Detroit Grand Haven & Milwaukee Railway Company's Stockholders, bondholders, and other creditors. No real and substantial distinction upon which to base a classification for the purpose of taxation exists between the stockholders, bondholders and other creditors of that company and the stockholders, bondholders and creditors of other Michigan railway companies. The court is therefore of the opinion that Act No. 95, in thus singling out the stockholders, bondholders, and other creditors of the Detroit, Grand Haven & Milwaukee Railway Company for the purpose of the tax, thereby imposed, does constitute class legislation in contravention of the fourteenth amendment, and that said act and the taxes assessed thereunder are thereby rendered void and of no effect. See Northern Pacific R. Co. v. Walker (C. C.) 47 Fed 681; Railway v. Taylor (C. C.) 86 Fed. 168; Railroad v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892; Railway v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; Cotting v. Stockyards Co., 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92; Railway Co. v. Greene, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Am. Cas. 1217."
>
> Detroit, etc., Ry Co. v. Fuller, 205 Fed. 86 (at 89).

In Ritterbusch v. Atchison, T. & S. F. Ry. Co., 198 Federal, 46 (8. C. C. A.), the court says:

> "And where a complainant claims and shows by the averments in his bill that the entire tax is void, or that a substantial part of it is inequitable, and it is impossible to determine what portion, if any, is valid, no tender or payment of any part of the taxes, and hence no averment of any such tender, is essential to sustain a bill to enjoin their collection. Fargo v. Hart, 193 U. S. 490, 502, 24 Sup. Ct. 498, 48 L. Ed. 761."

In Lacy v. McCafferty, County Treasurer, et al, 215 Federal, 352 (8 C. C. A.), the court affirmed the findings of fact in the lower court that there was not intentional over-valuation of the complainant's property and in addition quoted from Atchison, etc., Ry. Co. v. Sullivan, 173 Fed. 456. The court said:

> "From these various provisions of applicatory law it

is manifest that if complainant's property and other property of its kind was assessed for the purposes of taxation at a greater rate than the property of other corporations and individual citizens was assessed, it was incontravention of the constitutional and statutory law of the state and of the United States and of course was unlawful, but that fact in itself would not entitle complainant to resort to a court of equity to secure relief; it must further appear that the assessing officers made the erroneous valuation not accidentally or inadvertently with respect to a single piece or kind of property, but systematically and intentionally with respect to one or more classes of property with the intention of imposing upon that class of property an undue burden of taxation. Cummings v. National Bank, 101 U. S. 153, 25 L. Ed. 903; Pittsburgh, etc., Railway Co. v. Backus, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031; Coulter v. Louisville & Nashville R. R. Co., 196 U. S. 599, 25 Sup. Ct. 342, 49 L. Ed. 615; Raymond v. Chicago Traction Co., 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757; Taylor v. Louisville & N. R. Co., 31 C. C. A. 537, 88 Fed. 350."

Lacy v. McCafferty, etc., 215 Fed. 352 (at 354).

In Atchison T. & S. Ry. Co. v. Sullivan, 173 Fed. 456-461 (8. C. C. A.), Judge Sanborn says:

"These facts leave no doubt that the taxing officers of Bent County adopted a rule pursuant to which they systematically and intentionally grossly underassessed the property of that county within their jurisdiction, with the legal intent unlawfully to diminish the burden of taxation upon property in that county other than railroad property, and to increase the burden of taxation upon railroad property; and if this were the whole case the complainant would be entitled to relief from the unlawful portion of this burden. A systematic and intentional under or over assessment of one or more classes of property in violation of the law, whereby one or more classes of property is to be made to bear an undue proportion of the burden of taxation, presents a good cause of action for relief from the payment of the unjust part of the proposed tax. Taylor v. Louisville & N. R. Co., 88 Fed. 350, 372, 31 C. C. A. 537, 559; Cummings v. National Bank, 101 U. S. 153, 158, 25 L. Ed. 903; Raymond v. Chicago Traction Co., 207 U. S. 20, 37, 38, 28 Sup. Ct. 7, 52 L. Ed. 78; Pittsburgh, Cincinnati, Chicago & St. Louis R. Co., v. Backus, 154 U. S. 421, 425, 435, 14 Sup. Ct. 1114, 38 L. Ed. 1031."

And again at page 468-469:

"The evidence is conclusive that he so understood his duty, but that he and the other county officers intentionally omitted this property from the assessment pursuant

to a rule and practice of the assessors and county commissioners of that county which had long prevailed to assess and tax no fat stock therein, because they wished to encourage the industry of feeding this stock in their county in order to provide a market for hay and to make general business prosperous in their community. The injustice of this rule and practice to the railroad company is demonstrated by the fact that the whole number of fat sheep in the county in the spring of 1905 was about 131,755 and their value at the rate applied by the assessor to other property for the purposes of assessment would have been about $223,983.50, while the whole number of sheep he actually assessed was only 25,515, at a valuation of $43,416.00, and if these fat sheep had been assessed at the valuation above stated the complainant's tax would have been reduced about $3,000.00."

And again at 470:

"Not only this, but the omission of the fat stock and the credits had been repeated by the officials of this county year after year. It was their habitual practice to omit them, and this practice threatened to continue. It had grown into a rule, and yet it was a violation of the Constitution of the state, which requires that 'all taxes * * * shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal,' (article 10, sec. 3), and of the statute, which required all personal property not exempt to be assessed. It was systematic, intentional and continuing and where there is systematic, intentional and continuing omission or undervaluation of other taxable property by the taxing officers of astate or county, in violation of the Constitution or law, which inevitably effects an unjust discrimination in taxation against the property of the complainant and against other property similarly situated, a bill in equity will lie to enjoin the collection of that portion of the tax which resulted from the illegal discrimination. Cummings v. National Bank, 101 U. S. 153, 158, 25 L. Ed. 903; Raymond v. Chicago Traction Company, 207 U. S. 20, 36, 37, 28 Sup. Ct. 7, 52 L. Ed. 78; Railroad and Telephone Companies v. State Board of Equalizers (C. C.) 85 Fed. 302, 307, 318; Fargo v. Hart, 193, U. S. 490, 503, 24 Sup. Ct. 498, 48 L. Ed. 761; Reagan v. Farmers' Loan & Trust Company, 154 U. S. 362, 391, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Nashville C. & St. L. Ry. v. Taylor (C. C.), 86 Fed. 168, 184; Louisville Trust Co. v. Stone, 107 Fed. 305, 46 C. C. A. 299."

d. RULE OF THIS COURT.

In Pullman Co. v. Knott, 235 U. S. 23, it is said: (Syllabus, 2d Div.)

"A state tax will not be upset under the equal pro-

tection provision of the Fourteenth Amendment upon hypothetical or unreal possibilities if good upon facts as they are. Keokee Consolidated Coke Co. v. Taylor, 234 U. S. 224."

In Choctaw v. Gulf R. R. Co., 235 U. S. 292, it is said, at page 298:

"Neither state courts nor legislatures by giving a tax a particular name, or by the use of some form of words, can take away our duty to consider its real nature and effect. Galveston, Harrisburg & San Antonio Ry. v. Texas, 210 U. S. 217, 227."

In Galveston, Harrisburg & San Antonio Ry. v. Texas, 210 U. S. 217-227, it is said:

"A practical line can be drawn by taking the whole scheme of taxation into account."

An article in American Law Rev. Vol. 37, p. 654, which is part of an address by Alton B. Parker to the Georgia Bar Association in 1903, reviews somewhat the history of the expression "Due Process of Law" prior to the Federal constitution and thereafter until the Fourteenth Amendment, and upon the question of whether the negroes as a class were the entire cause of the amendment, (see the Strauder Case, 100 U. S. 303-6), said:

"While the opinion expresses accurately, probably, the general view of the purpose of the Fourteenth Amendment, several senators contributing toward its formation have said that it was intended by the farmers to operate in the broadest sense. Roscoe Conkling, a leading member of the Reconstruction Committee, which drafted the amendment, in his argument in the San Mateo County case, produced the journal of the committee to show how the various provisions came to be inserted, and he said that individuals and corporations had been for some time appealing for congressional protection against discriminating and unfair state and local taxation, and asserted that the committee intended to give to the provision in the proposed amendment the broadest possible scope and operation for the benefit of all persons, whether white or black."

As early as Pelton v. National Bank, 101 U. S. 143, in a case involving the question of whether a legislative act of Ohio was in conflict with the Ohio constitution and contrary to Section 5219 of the Rev. Stat. of the U. S., this Court, through Mr. Justice Miller, said:

"The bill states very distinctly that the principle on which the valuation of the shares of the bank for taxation is made 'destroys the uniformity of the rule fixed by the Constitution and violates the obligation thereby imposed to treat all property alike, to the end that all propery may bear an equal burden of taxation, and is subversive of the act of Congress allowing such shares to be taxed and intended to protect the owners thereof from greater burdens than were imposed on other moneyed capital at the place where the bank was located.' 'The necessary effect,' it is added, 'of the proceedings had in the assessment and levy of the taxes standing against the shareholders of your orator, and now about to be enforced, has been to deprive such shareholders, both in the matter of valuation and equalization, of all benefit of the Constitution and general laws of the state, by which only uniformity in the burden of taxation upon all descriptions of property could be secured, to take from them the security afforded by the limitation in the act of Congress and to impose upon them such excessive exactions as to make the franchises granted by said act comparatively useless.' The answer, by way of denial, says that the 'taxes mentioned in said complainant's bill, assessed upon the shares of said complainant's banking association, are not taxed at a greater rate than is imposed by the state of Ohio upon other moneyed capital in the hands of individual citizens of said state resident in the city of Cleveland, where sand banking association is established and located."

"It is thus very clear, whether the taxation of which the bank complained was a tax on its shares greater than on other moneyed capital invested in Cleveland, was a question fairly raised by the pleading."

"The argument is advanced here which we considered in People v. Weaver (100 U. S. 539), namely, that if the amount of tax assessed on these bank shares is governed by the same percentage on the valuation as that applier to other moneyed capital, the act of Congress is satisfied, though a principle of valuation is adopted by which inequality and injustice to the owners of them must necessarily result. We do not propose to go over that argument again. The cases were considered together in conference, because they involved that principle. It is sufficient to say that we are quite satisfied that any system of assessment of taxes which exacts from the owner of the shares of a national bank a larger sum in proportion to their actual value than it does from the owner of other moneyed capital valued in like manner, does tax the shares at a greater rate within the meaning of the act of Congress."

After reviewing the evidence, it is further said:

"It is thus seen that the auditor and the city board of equalization valued these shares higher in proportion to other moneyed capital in Cleveland to an extent which the witness does not state, but which may be supposed to be thirty per cent, as it is shown to be in comparison with real estate; and the state board added about one-fourth to that, so that the tax on the national bank shares, against which relief is sought in this suit, is between fifty and sixty per cent on its real value greater than on other moneyed capital, and, therefore, to that extent forbidden by the act of Congress.

"For this injustice and this violation of the law there ought to be some remedy. To the specific one of an injunction by a suit in chancery, and, indeed, to any remedy by the bank, many objections are raised; but as all of them have been considered and overruled in the case of Cummings v. National Bank (infra, p. 153), which was argued at the same time this case was, it is unnecessary to repeat here what is said in that case."

Turning then to Cummings v. National Bank, 101 U. S. 153, Mr. Justice Miller points out that they had a statute in Ohio where the case arose allowing injunctions to enjoin illegal taxes, but says:

"Independently of this statute, however, we are of the opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power. That is precisely the case made by this bill, and if supported by the testimony, relief ought to be given."

And again:

"It is proper to say, in extenuation of the rule of primary valuation of different species of property developed in this record, that it is not limited to the State of Ohio, or to part of it. The constitutions and the statutes of nearly all the states have enactments designed to compel uniformity of taxation and assessments at the actual value of all property liable to be taxed. The phrases 'salable value,' 'actual value,' 'cash value,' and others used in the directions to assessing officers, all mean the same thing, and are designed to effect the same purpose. Burroughs, Taxation, p. 227, sec. 99."

In Upshur County v. Rich, 135 U. S. 467 (L. Ed. 198-199), the Court in speaking of the function of assessors and the

question of whether or not an appeal from an assessment was a removable suit, said:

> "At the same time we do not lose sight of the fact, presented by every day's experience, that the legality and constitutionality of taxes and assessments may be subjected to judicial examination in various ways,—by an action against the collecting officer, by a bill for injunction, by certiorari, and by other modes of proceeding. Then, indeed, a suit arises which may come within the cognizance of the federal courts, either by removal thereto, or by writ of error from this court, according to the nature and circumstances of the case. Even an appeal from an assessment, if referred to a court and jury, or merely a court, to be proceeded in according to judicial methods, may become a suit within the act of congress. But the ordinary acts and doings of assessors, or of appellate boards of assessors, in passing upon matters of mere valuation, appraisement or proportionate distribution of expense, belong to a different class of governmental functions, executive and administrative in their character, and not appertaining to the judicial department. If an illegal principle of valuation be adopted, or an unconstitutional assessment or tax be made or imposed, or fraud be practiced, it may be examined by one of the judicial methods referred to, and thus become the subject of a suit."

In Fargo v. Hart, 193 U. S. 490, L. Ed. 761, in speaking with respect to the necessity of a tender, this court said:

> "We have explained why, in our opinion, this cannot fairly be treated as a mere case of overvaluation, but is an assessment made upon unconstitutional principles. Under such circumstances it was impossible for the company to tender any sum, because it was impossible for it to say what, if anything, it ought to pay. It denied that under the Constitution it ought to pay anything, and it is plaint that for the year 1898, at least, it properly could have been assessed but a comparatively trifling sum. The contention of the company was serious and plausible. It made the only offer it could, which was to give security for the payment of whatever amount should be adjudged to be due. 'If there was no right to assess the particular thing at all, * * * an assessment under such circumstances would be void, and, of course, no payment or tender of any amount would be necessary before seeking an injunction.' People's Nat. Bank v. Marye, 191 U. S. 272, 281, ante, 180, 24 Sup. Ct. Rep. 68, 71. See also Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 30 L. Ed. 118, 6 Sup. Ct. Rep. 1132; California v. Central P. R. Co. 127 U. S. 1, 32 L. Ed. 150,

2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Central P. R. Co. v. California, 162 U. S. 91, 112, 40 L. Ed. 903, 16 Supt. Ct. Rep. 766.

"The assessment being bad, for the reasons which we have stated, the board of tax commissioners acted without jurisdiction, according to the decision of the supreme court of Indiana. Hart v. Smith, 159 Ind. 182, 58 L. R. A. 949, 64 N. E. 661."

In Coulter v. Louisville & N. R. Co., 196 U. S. 599 (L. Ed. 615), this Court applied the rule of inequality in valuation to the taxation of a franchise, as compared to other property. That was a bill in equity by a railroad company against taxing officers where the only ground of jurisdiction was that the state law required all property to be assessed at its fair cash value and where the officers assessed the general property of the community at not to exceed eighty per cent, and the railroad's property at its full value. The Court concluded in that case that the prevailing testimony showed that there was no scheme of the sort shown, but said:

"On the other hand, in a proper case, a bill may be brought to restrain apportionment and certification to the counties. Fargo v. Hart, 193 U. S. 490, 495, 503."

Raymond v. Chicago Traction Co., 207 U. S. 20, came up from the Federal Court from Illinois, 114 Fed. 557 (112 Fed. 607). In the court below (114 Fed. 557), it was held that equity would enjoin the collection of taxes levied on assessments made on a wrong and discriminatory basis that threatened, because of fraud, mistake, coercion or fictitious values, to take the taxes without due process of law and against the equal protection of the laws. When that case reached this court, it considered the taxing system. The claim there was that the taxing officers, including the Board of Equalization, assessed the franchises and other property of the companies in question, at a much higher rate and by a different method, than that applied to other corporations for the same class for that year. Mr. Justice Peckham, speaking for this court, said:

"The result is an enormous disparity and discrimination between the various assessments upon the corporations. The most important function of the board, that of equalizing assessments, in order to carry out the provisions of the constitution of the state in levying a tax

by valuation, 'so that every person shall pay a tax in proportion to the value of his, her or its property,' was, in this instance, omitted and ignored, while the board was making an assessment which it had jurisdiction to make under the laws of the state. This action resulted in an illegal discrimination, which, under these facts, was the actio nof the state through the board." * * *

"We are also of opinion that the case is one over which equity has jurisdiction. In Cummings v. National Bank, 101 U. S. 153, this court held that the case was one properly brought in equity. It was to restrain the collection of a tax."

After referring to, and quoting from, Cummings v. National Bank, said, page 38:

"We have in the case at bar similar facts. A system of valuation was adopted and applied to a large class of corporations, differing wholly from that applied to other corporations, of the same class, and resulting in a discrimination against the appellee of the most serious and material nature. It is not a question of mere difference of opinion as to the valuation of property, but it is a question of difference of method in the manner of assessing property of the same kind. Although the law itself may be valid and provide for a proper valuation, yet if, through mistake on the part of the state, through its board of equalization, and while acting as a quasi-judicial body, the board erred in the method to be pursued in relation to the corporations now before us, the mistake is one which may be corrected in equity."

The Court had, on page 35, said:

"Acting under the constitution and laws of the state, the board therefore represents the state, and its action is the action of the state. The provisions of the Fourteenth Amendment are not confined to the action of the state through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that, whoever by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the state. Chicago, Burlington & Quincy R. R. v. Chicago, 166 U. S. 226, 41 L. E. D. 979, 17 Sup. Ct. 581. Following the above case the Federal courts throughout the country have frequently reviewed the action of taxing bodies when under the facts such action was in effect the action of the state, and therefore reviewable by the Federal courts by virtue of the provisions of the amendment in

question. See Nashville, etc., Ry. vv. Taylor, 86 Fed. 168; Louisville Trust Co. v. Stone, 107 Fed. Rep. 305. In the last case which related to enjoining the collection of alleged illegal taxes by reason of discrimination, the Court said: 'It may be conceded that, if the allegation of the bill are made out, there exists, in respect to the property of complainant and others similarly situated, a systematic intentional, and illegal undervaluation of other property by taxing officers of the state, which necessarily effects an unjust discrimination against the property of which the plainiff is the owner, and a bill in equity will lie to restrain such illegal discrimination, and that in such cases Federal jurisdiction wil larise because of the equal protection of the laws guaranteed by the Fourteenth Amendment.'"

The Court said at 37:

> "We are also of opinion that the case is one over which equity has jurisdiction. In Cummings v. National Bank, 101 U. S. 153, this Court held that the case was one properly brought in equity. It was to restrain the collection of a tax."

In C. B. & Q. Ry. Co. v. Chicago, 166 U. S. 226, this court held that it was not due process of law to take private property for public use without compensation, even though done through the judgment of a state court, and authorized by statute.

In First National Bank v. Albright, 208 U. S. 548, this Court said:

> "The earilest moment for equity to interfere is when an assessment has been made."

And:

> "We assume that such an assessment of shares as is apprehended would be invalid under Rev. Stat., Sec. 5219. First National Bank of Wellington v. Chapman, 173 U. S. 205, 219, 220, 43 L. Ed. 669, 674, 675, 19 Sup. Ct. Rep. 407. We assume that it would be invalid none the less if disguised as a tax on sixty per cent of the par value, if other moneyed capital was uniformly and intentionally assessed at one-third of its actual value and if sixty per cent of the par value of the bank shares was more than one-third of their actual value. Accidental inequality is one thing, intentional and systematic discrimination another. See further Raymond v. Chicago Traction Co., 207 U. S. 20."

There is no doubt but that this court will not hold that decisions of a state court should be reversed for ordinary errors

inthe administration of a state statute, upon this ground.

In Southern R. Co. v. Greene, 216 U. S. 400 (L. Ed. 536), this court held that the Fourteenth Amendment to the Federal Constitution protected a foreign railway company from a franchise tax for the privilege of doing business where no tax was required of corporations covering similar business and where the corporation had qualified as a foreign corporation, and acquired property of a permanent nature in the state. This court, through Mr. Justice Day, said:

> "The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the state of Alabama within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation."
>
> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 165, 41 L. Ed. 666, 668, 671, 17 Sup. Ct. Rep. 255; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard), 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. Rep. 30; Conolly v. Union Sewer Pipe Co., 184 U. S. 540, 559, 46 L. Ed. 679, 689, 22 Sup. Ct. Rep. 431.
>
> "It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama, carrying on the railroad business in precisely the same way as the plaintiff."
>
> Southern R. Co. v. Green, 216 U. S. 400 (at 416-17).

In Clement Nat. Bank v. Vermont, 231 U. S. 118 (L. Ed. 147), this court pointed out that under Section 5219 of the U. S. Compiled Statutes 1901, page 142, that "The object is to prevent hostile discrimination and for this purpose a standard is fixed," but in speaking of the question of equal protection of the laws further, where the federal statute did not control, it is said:

> "With respect to the taxation of depositors' credits, the Federal statute does not prescribe a rule; and, the

property being normally subject to the state's taxing power, there is no warrant for implying a restriction which would extend beyond the requirements of protection from the prejudicial effect of such exactions as would be unjustly discriminatory.

"It follows that the comparison must have regard to business and property which may be deemed to have, generally speaking, a similar character."

Clement Nat. Bank v. Vermont, 231 U. S. 118 (L. Ed. 147).

LEGAL HISTORY OF STATE SHOWS NATURE OF INSTITUTION TO BE AS CLAIMED.

The following applicable things appear in the legal history of the state:

a. Chapter 138 of the General Laws of Minnesota, 1883, under which the Chamber exists, provides:

"It may prescribe the terms and conditions of its membership, the mode of admission and members. * * *"

The law provides for the sort of a private institution which has grown up.

b. That act also provides that:

"whenever by it deemed necessary, may raise money for the purposes of the corporation by assessments upon the members thereof, and the payment of such assessments may be enforced by a sale or forfeiture of the membership of any member failing to pay the same, in such manner as the by-laws or rules may provide; but the aggregate of all assessments made in any one (1) year, shall not exceed the sum of one hundred dollars ($100) upon each member, unless a majority of the members of the corporation shall vote in favor of such extra assessment."

c. It is also provided by that act that:

"Said corporation may inflict fines upon any of its members, and collect the same, for breach of its rules, regulations or by-laws; said fines may be collected by action of debts before a justice of the peace, or in any court of record having jurisdiction of the amount of the fine, in the name of the corporation, or by temporary suspension or permanent removal from membership, or removal from office therein."

d. In the case of Evans v. Chamber of Commerce, 86 Minnesota, 448, being an action against this very association, the

Supreme Court laid down the rule that these memberships were subject to self-imposed conditions and were not property in the general sense, saying:

> "Clearly, under these statutory provisions, the association had the right to make membership conditional upon a submission to arbitration of business disputes arising between its members, and the rules in question went no farther than this."

The Court points out that this membership was gotten upon these conditions and that "as expressed in some cases, such a membership is 'clogged with conditions,'" and then says at page 453:

> "This is nothing new or novel, for such conditions are annexed to membership in many societies and associations, social, fraternal and religious. In these organizations, as well as in defendant association, membership subject to conditions is optional, not compulsory. All members became such voluntarily, stipulating to conform to the by-laws or to submit to expulsion, which is nothing but a self-inflicted exclusion from membership rights and privileges."

e. In the case of McCarthy Bros. v. Chamber of Commerce, 105 Minnesota, 497, that court, speaking through Judge Elliott, of this association, said:

> "In pursuance of its statutory and inherent powers to make proper rules and regulations for its government and operation (Evans v. Chamber of Commerce of Minneapolis, 86 Minnesota 448, 91 N. W., 8), the Chamber adopted the rule which we have quoted, which enables business firms and corporations to acquire membership for the purposes therein stated. In no other way can a corporation become a member of the Chamber. As said of a similar co-organization in American v. Chicago, 143 Ill., 210, 32 N. E. 274, 18 L. R. A. 190, 36 Am. St. 385, it has 'an undobuted right to adopt this rule, and as it prescribes the mode and the only mode in which membership in the exchange can be obtained, no one can justly claim to be a member who has not been admitted in the mode thus prescribed.'"

It will be noticed that this statute and these decisions bear out the claims of the complaint on the facts of conditional ownership and that the Evans case places this very association in the class with the very sort of corporations whose memberships are not taxed.

This is the class in which the legislature and its advisers treat this sort of corporations. By chapter 299 of the G. L. of 1911, the Governor, the Chief Justice of the Supreme Court, and the Attorney General were constituted a compilation commission to enter into a contract for the statutes now cited as Gen. Stat. of Minnesota, 1913. With the assistance of Mr. Tiffany and its own staff the West Publishing Company published this compilation through this arrangement (see Pref. Gen. Stat. Minn. 1913).

The statutes were compiled and slightly rearranged. That revision classes Chambers of Commerce and Boards of Trade among the "Social and Charitable Corporations." The provisions for their formation (sec. 6536, 6537), are between "Corporations to Administer Charities" in 6534-5, and Camp Meeting Associations in 6538-40.

This was the class of corporoations to which the Chamber belonged and the defendants were correct in so admitting by the demurrer. If the legislature should conclude that they should be singled out for taxation, and could find a legislative basis for the distinction, or if the finding were against the similarity as in the Dultuh case, then the defendant could deny the similarity, but not on the record here.

In fact, we do not recall any decision under facts similar to those in this particular case where the courts have failed to make such treatment. The court did not stop here to apply this fundamental similarity, as admitted in this complaint, so this case does not count in this statement.

The *possession*, the *use*, the *disposition* are all *contingent*, in this case, as the *facts* show. So is the similarity.

A person wishing to become a member, learning where he can find a membership, can arrange to buy it for $3,500, if he can be admitted; but if he cannot be admitted, he cannot become a member and cannot become the owner. He therefore makes a conditional purchase; if he can be admitted he buys; if he cannot, he does not. The member can not sell nor the applicant buy, even as between themselves, subject only to the usual rules of law or legal ownership; they are subject to such rules and even whims as any social, fraternal or

business club could impose; subject to be black-balled, in which case they never become members, (see Tr., pp. 41-2, fols. 133-4).

If a person undertakes to buy a membership he cannot buy it without the approval of its Board of Directors; he may agree to buy it conditionally, but he never gets it in fact or in law, unless he is approved by the Board. He cannot take it and sell it himself to another, or it cannot be transferred through him to another; he cannot obtain it as collateral; there is no interest which can be gotten in it except according to its rules and regulations.

It has *no earning capacity* in and of itself; there is *no Good Will* to the Chamber which produces business for any particular individual who might be a member as Good Will might produce business to a corporation engaged in business for itself. *The results depend entirely upon the individual efforts of the particular member.*

The only thing that makes its membership occasionally sell at all, and especially at a premium above the physical assets, is the fact that the members have associated themselves together in such way that a few people think they can afford to pay for the privilege of becoming a member, if that privilege is granted. The possibility of acquiring that privilege, however, depends upon the *character and standing of the individual, his financial responsibility, his general business integrity and reliability, and the fact that those using either white or black balls* upon him think that he is a fit associate to carry on a commercial business of high order, under self-imposed conditions, requiring a much higher standard of business honesty and integrity than the law would otherwise impose. *Unless he has* such *standing*, and can *convince the association* that he has such standing, he *cannot be admitted upon any terms or for any price;* if he does have such standing and ability, and it is voted to receive him into the fold, he may buy the privilege, *otherwise he will not be able to use the membership at all or even have it transferred to, or through, him.*

In the last analysis, therefore, the value of these member-

ships, as to the privilege portion, is contingent, or rather dependent, upon the character and standing of the person who seeks to buy, and the limited number which can be acquired; but even then subject to all the limitations disclosed by the complaint.

This brings us to the question of whether or not a few men by simply associating themselves together in a club, fraternal order or business association can, by limiting their membership to a comparatively few, and carefully choosing their associates in such way as to keep up standards of integrity, and conditioning the transfer of all memberships in their assembly upon their own whims, personal likings and the business reputation of the applicant, thereby create taxable property for that applicant. In other words, does mere association together in this intangible way, which of itself produces nothing and to which no one would become absolutely entitled to either enter or remain, create a million dollars worth of property? If that is so and they should disband, that property would cease.

It is not a thing they can sell unless they find some person willing to pay a premium to take their place in the organization, and unless that person is of character and standing sufficient for the association to receive him as one of its number. We can hardly say that the association of many is the value, for it is common knowledge that the memberships in some of the bigger exchanges can be most easily had, because the number is greater. If it is the good business character of the *member*, or the opportunity to deal with others of high business character which commands a premium because the opportunities for the association are limited in number, and which only can be conditionally acquired, used or conveyed, then it is a queer *whim* to call property.

That this is an intangible privilege, conditional in its nature and lacking all of the three elements of property as defined under all the systems of both civil and common law in the past, there would seem to be no question.

In *Barclay against Smith*, 107 Ill. 349, it was said *of a certificate of membership in the Board of Trade of Chicago*:

"It may be said that a certificate of membership has a large value, and hence ought to be regarded as property. It is true that the board requires a person who becomes a member to pay an initiation fee of $5,000, and the evidence shows that a certificate of membership is regarded in the market as worth $4,000; but this does not change the character of the right. A church organized under our statute may own property, for the uses and privileges of its members, worth as much as the property possessed by the board of trade, and the right of a member to attend the meetings of the church and occupy a pew may be regarded as a high and valuable right, and yet the right of membership has never been regarded as property which may be subjected to the payment of the debts of a member. The same may also be said in regard to the membership in a masonic lodge, or a social club, and various other organizations of a similar character.

"There may be, and doubtless are, many privileges which a man may possess that are valuable to him, which do not fall within the definition of property, and which may be enjoyed, but can not be subjected to the payment of debts. A liquor dealer may be licensed to sell liquors at a certain place, for a certain time, for which privilege he is required to pay $1,000 per annum. That privilege is worth to him much more than he is required to pay; but is that privilege property which may be sold on execution, or reached by a creditor's bill for the payment of debts? We have never so understood the law. A peddler or an auctioneer may be licensed to carry on his vocation within a certain district, for which he may pay a stipulated sum of money. The profits arising from the privilege of exercising the right may be much larger than can be earned by a person exercising the right to transact business on the floor of the board of trade, and yet we have never understood that such a privilege was liable to be seized and sold in satisfaction of debts. The attorney and the physician are licensed to practice their professions. It costs money to obtain such a privilege. It may be, and is, a valuable right, and yet, such a right cannot be taken by a creditor's bill and sold in satisfaction of a debt. The same may be said in regard to various other privileges which may be, and often are, conferred upon persons in the different pursuits of life.

"A certificate of membership in the Board of Trade of Chicago empowers the person who is admitted as a member to attend the meetings of the board, and deal in the various products of the country. This right to appear in a certain place and transact certain business, in our judgment is not property, but it is mere privilege conferred upon the member, which cannot be reached and sold by the process of courts. It is a right which

may be regarded as valuable, but which cannot be divested or destroyed, except by the board itself, for a failure of the member to conform to the rules and regulations of the association. This view is in harmony with the rule announced by the Supreme Court of the State of Pennsylvania, where a similar question arose. Thompson v. Adams, 93 Pa. St. 55; Pancoast v. Gowen, Id. 66.

In *Thompson v. Adams*, 93 Pa. St. 55, it was held that a *seat in the Philadelphia Board of Brokers could not* be seized for the payment of a debt *where it was to be held and enjoyed with the limitations and restrictions placed upon it, and that an equitable owner of a seat,* who is *unknown to the association, cannot share in the proceeds of the sale of the seat.* In that case the Court said:

> "Per Curiam—The constitution and articles of a voluntary association, such as the Philadelphia Board of Brokers, are law as to the members. The plaintiff below was not a member, but had furnished the money by which Richards obtained a seat. His contention is that he was the equitable owner of the seat, and had title to what was received for it, and that the defendant had no right to apply the proceeds to debts due by Richards to other members, in pursuance of the terms of the constitution of the club. But why not? Richards was the member of the board, the legal owner of the seat, and the plaintiff an entire stranger, unknown to the association. The members gave credit to each other in part, no doubt, upon the faith of the liability of a member's seat to them for his debts. There is nothing unlawful or unreasonable in this regulation. The seat is not property in the eye of the law, it could not be seized in execution for the debts of the members. It is the mere creation of the board, and, of course, was to be held and enjoyed with all the limitations and restrictions which the constitution of the board chose to put upon it."

Such is the situation here, and the Minnesota court had sustained the view that admission cannot be made except according to the rules. This association recognized no outside interests whether as collateral or otherwise.

In the case of *Pancoast v. Gowen*, 93 Pa. 66, growing out of the Philadelphia Stock Exchange, which has limitations similar to those in question, the issue was as to whether the membership or privileges of membership, were property, such

as could be levied upon and sold under execution on attachment. In that case the Court said:

> "A seat in the Board of Brokers was not property subject to execution in any form. It is a mere personal privilege, perhaps more accurately, a license to buy and sell at the meetings of the Board."

In the case of In re Sutherland, 6 Bissell, p. 526, the Federal Court of Chicago, where the members were admitted to *use* their memberships and dispose of them subject to conditions similar to those here, and were liable to be excluded in the same way they are here, Judge Blodgett said:

> "It will be seen there is no pecuniary profit to the members of this body further than what is derived from the incidental use made by a member of the privilege which his membership gives him. It confers no property rights; that it, it represents no interest in property, but only, like the membership of the Masonic lodge, or church, or social club, confers upon the member the privileges of the order."

In People v. Fietner, 167 N. Y. 1, 60 N. E. 265, the Court had under discussion the question of whether or not a seat in the New York Stock Exchange was taxable, and during the course of argument considered the question of whether or not such a certificate could be sold on execution for the purpose of determining the real nature of the property. The Court said:

> "We have been cited to no case where the stock exchange has admitted to membership the purchaser at a judicial sale. The court has no power to compel such action, and the probability of a creditor reaching a favorable result by selling the seat of a member is, to say the least, exceedingly remote. * * * This membership, which in a certain sense personal property 'clogged with conidtions,' is clearly not such personal property as is taxable under the laws of this state."

A very good case illustrating this is that of *Chicago Board of Trade v. Nelson*, 162 Ill. 431, 44 N. E. 743. That was a question (like the McCarthy case in Minnesota) of the right to admit or expel members, and the Court said:

> "The statute of the Board of Trade has been determined by this court in numerous cases; and it has been held to be merely a voluntary organization, although incorporated under an act of the general assembly. It

is averred in the petition that it owned a building and rented out rooms as offices, from which it derived an income; that this income was insufficient for its expenses and as an assessment was required each year; and that the present value of a membership is about $800. This does not change in any respect the character of the association, which must be determined by its charter. Any club or voluntary association, whether incorporated or unincorporated may rent out rooms, and derive income therefrom; but the character of the association is not changed by that fact. The right to pursue a business as a member of such an organization in the hall of the building devoted to that purpose may be a thing of value; but its value is incidental to the membership, and a determination of such membership destroys the rights under it.

In the case of *Pacaud v. Waite*, 218 Ill. 178, the Court said:

> "An attempt is made to draw a distinction between those cases and the case at bar, on the ground that they recognize only the right to discipline the member, while this case involves the property rights of the member. We do not think the distinction a valid one."

THE COURTS HOLD WITH THIS VIEW ON SUBJECTS OUTSIDE OF TAXATION.

Evans v. Chamber, 86 Minn. 448, points out very clearly that the *privileges of membership*, the use and control, are subject to the conditions of the rules. One case cited and quoted with approval in the Evans case is that of *Belton v. Hatch*, 109 N. Y. 593, 17 N. E. 225. In that case the constitution of the Stock Exchange provided that when one lost his membership or seat the proceeds of the sale of the seat might be appropriated to his creditors or any of the corporate objects of the association. *The member in that case offended against the laws of the exchange and was discharged; the assignee sued to recover the value of the seat, which according to the market price, was $25,000, but was defeated upon the ground that the member had no property right which he could enforce.* The Court points out in that case that that membership had become valuable but the value was subject to these conditions and by reason of them and then said:

> "Membership may be property, but it is not property in every sense. If it is property, it is encumbered with

conditions, when purchased, without which it could not be obtained."

OTHER COURTS HAVE UNIVERSALLY REFUSED TAXATION OF SUCH MEMBERSHIPS.

The question of taxation of seats, (and they mean memberships in such corporations), came directly before the Supreme Court of California in the case of *City and County of* San Francisco v. Anderson, 36 Pac. 1034, where the Court said:

> "The *only question* in this case is whether or not a *seat* in the San Francisco Stock and Exchange Board is taxable property, and in *our opinion* it is not."

And again:

> "It is a mere right to belong to a certain association, with the latter's consent, and to enjoy certain personal privileges and advantages which flow from membership of such association. Those privileges and advantages cannot be transferred without the consent of the association, and a forced sale of them would not give to the purchaser the right to occupy said 'seat.' It is too impalpable to go into any category of taxable property. Respondent cites Chute v. Loveland, 68 Cal. 254, 9 Pac. 133, but that case went upon the theory that the seat of a member of the said stock board represented his interest in the property of said board, and in the property of a certain corporation called the 'Company of Associated Stockholders,' with which said stock board had certain relations. Now, the alleged taxes for which this suit was brought were for the fiscal year 1889, and the stipulated facts show that for said year 'all the real and personal property, owned by, or in the possession or under the control' of said San Francisco Stock and Exchange Board and said Company of Associated Stockholders, was duly assessed to said board and said company, and that all taxes levied to pay the assessments were by said board and said company fully paid. Therefore, under the theory of the said case invoked by respondent, the attempt to tax said seat, in addition to the taxes levied upon all the property of said stock board and said corporation, was clearly an attempt at double taxation, and void, within the principle of the case of Burke v. Badlam, 57 Cal. 594."

This shows that it would be *double taxation* to tax the *certificates so far as they represent* the property and that they are not *taxable property* so far as they *represent the privileges.*

The question of whether or not a *seat* in the New York Stock Exchange was taxable went before the Court of Appeals of New York in the case of People ex rel. Lemmon v. Feitner, 60 N. E. 265 (167 N. Y. 1), and it was held that the taxing statute did not cover it, and that the seat was not property in the sense of the definition there given of personal property.

The tax law there provided:

> "Non-residents of the state doing business in the state may be taxed on the capital invested in such business, as personal property. * * *"

The New York Court pointed out in the above case the *nature of the organization, such as ours,* and said:

> "The relator contends that his membership is purely a personal privilege, and the value thereof cannot be regarded as a sum invested in business in this state. If it be admitted that a seat in the exchange is, in a certain sense, personal property, it does not advance the argument in support of the contention that its value is to be regarded as invested in business conducted by the owner. The New York Stock Exchange transacts no business as such in the buying and selling of stocks. Its main object, as already stated, is to afford its members the facility for the transaction of business by providing them with a convenient exchange of salesroom. The business therein transacted is that of the individual members and the conveniences afforded by the exchange renders it practical to carry on with speed and safety the enormous dealing in stocks and other securities incident to the great money center of the country."

The Court then points out at length that under certain *circumstances and clogged with conditions the membership is property,* saying:

> "And unless the property sought to be taxed comes within the definitions of the statute, defining real and personal property, it is, of course, not taxable. It is clear that property of the nature of a membership or seat in the stock exchange is not within the definitions of subdivision 4 of section 2 of chapter 908 of the laws of 1896, and *therefore would not be assessable for purposes of taxation to a resident owner.*"

Then the question *came* before the Court of Appeals of Maryland, in the case of the *Mayor, etc., of Baltimore v. Johnston,* 51 Atl. 646, on the question of whether a *seat* in the *stock exchange* was covered by the provisions taxing *"all other prop-*

erty of every description" whatsoever. The Court revivewed the other cases and said:

> "A member cannot voluntarily dispose of his membership unless the proposed transferee is elected by the governing committee. No transfer is permitted until all dues to the exchange are paid in full, and, if the owner is indebted to any member, he cannot transfer his membership until he pays such indebtedness, if a protest is filed. In case of death the seat is disposed of by the committee on membership, and, after paying the claims of the members, it pays the balance to the legal representatives of the deceased."

And again at 649:

> "That there can be no justification in taxing them in the method attempted seems to be perfectly clear, when the provisions for other property such as we have mentioned are considered; and it would be impossible to place them in the category of bonds, stocks, evidences of indebtedness, etc., for the purpose of taxation under existing laws, as they are not embraced by any of them. We are, therefore, of the opinion that, notwithstanding the broad language of the statute, the legislature has not only not made provision as to how property such as this should be taxed, but as yet has expressed no intention of taxing it."

Many of these cases point out that the Courts have had trouble to determine just how far these certificates are property and how far they are privileges. Not many lawyers become familiar with this line of law, in practice—it is limited.

To a person familiar with the nature of these institutions the thing is very simple.

1. The ownership is all a conditional one, even as to the property of the association. The equitable interest of the member, in these bodies, like that of churches, fraternal orders and clubs, is one for limited use only.

2. This membership use is in the nature of a personal privilege and is not of right *salable*, or *transferable*.

3. The certificate is unlike corporate stock, but like religious, fraternal or social membership privileges in other associations.

> "There has been no contribution of capital by its members for the prosecution of business of any kind by the association. There has been no stock issued to its members, nor can the individual members claim any rights of property in it as stockholders.

"The association is engaged in no business and does not devote its fund to the prosecution of any undertaking to produce profit or gain to its members; * * *"

The case was reported to the full bench and the opinion was written by Daly. The opinion, at 355, says:

"It is not a union of persons joining together property, labor or skill for their common benefit, in any pursuit or business having a communion of profit and loss, and distinguishable by the feature that, if earned, there is to be a division of gains. It may be described as an association of persons engaged in the same kind of business, who have organized together for the purpose of establishing certain rules, by which each agrees to be governed in the conduct and management of his separate transactions or business."

Whiting v. Brownell, 2 Daly (N. Y.) 329.

After going over the elements of the nature of the membership, the Court said:

"It is too impalpable to go into any category of *taxable property.*"

In the Baltimore case, 54 Atlantic 646, the taxing provisions were: *"All other property of every description,"* which, it will be seen, is broader than our taxing provisions, and yet that Court said:

"Although counsel for both sides showed commendable zeal in the preparation of this case, and cited many authorities which seemed to them to reflect on some of the questions involved, we have not been referred to a single decision in which a seat in an exchange of this kind has been taxed."

The wording of the laws of Colorado was as follows:

"All taxable property shall be assessed at its full cash value."

Yet, in the Associated Press case, the Court said:

* * * "We are of the opinion that the membership in or contract with the Associated Press held by the News Company was not property subject to taxation within the intent, provisions, or meaning of either the constitution or of the statutes as now existing, and that hence the jujdgment of the district court was correct."

Board of Comrs. v. Rocky Mtn. News Co., 61 Pac. 494.

These Courts, with opinions based upon well understood, and previously uniformly recognized principles, speak with

all the solemnity of a uniform expression of systematic jurisprudence. Upon principle, sound; upon precedent, firm. They cannot be *ignored* without a violation of the principle of a needed uniformity of systematic administration of similar laws. In the interests of public policy, it is altogether more desirable that systematic administration of similar laws be had, than that a court, instead of a legislature, should amend a law which the legislature evidently does not want changed. There is a *legal* way to *change laws*, if, and when, a change is required or desired. Public opinion has a constitutional method of changing—by laws; the people have a constitutional method of expressing the desires to change the taxing laws and are not backward in so doing—when they desire it. But it is plain that the people do not want *memberships* in *voluntary associations taxed.*

There is here, as there usually is elsewhere, a reason or principle for this. They are not property of such nature as is usually taxed; they have no earning capacity, or good will, in and of themselves; the members are licensed as commission merchants by the state (Revised Laws Minnesota 1913, Section 4598); their charges for services are reduced to the lowest margin of any in the state; they police their own members and litigate their own disputes, by statutory authority through the board of arbitrators; their litigation in the courts is insignificant compared to their volume of business; they pay their share of taxes upon their property; none others in the state are first licensed for an ordinary business, and then taxed because of their *business character* and *fraternal associations* in their business.

Organizations of this general nature and the class to which it belongs—social, fraternal, religious and trade societies—have their places in a commonwealth, higher and beyond the ordinary principles of *financial productiveness in a profit sense;* but more in the nature of fraternal relations to increase individual advantage.

Lest doubt exist as to the application of these rules to this Chamber, we quote from the State Court on this Chamber's rules:

> "There is nothing new or novel, for such conditions are annexed to memberships in many societies or associations, social, fraternal, and religious."
>
> *Evans v. Chamber of Com.*, 86 *Minn.* 448.

The maintenance of a systematic and fair administration of the taxing laws of the state is, therefore, against the theory of selecting out some such organization, taxing its property, then taxing its memberships without authorization by statute, in the mere hope that, rather than resist, taxes may be acquired which are not legitimate.

Again in Strauch v. Uhler, 95 Minn. 307, it is said:

> "That contemporaneous exposition should be given great weight. State v. Northern Pacific Ry. Co., supra, page 43."

The plain fact is, that during nearly half a century which the Chamber has existed its memberships have never been taxed. It has been a matter of common knowledge that memberships in such associations are never taxed in Minnesota. It has been within the legislative possession during all the time; definitions of property have been well understood by the lawmakers of this state, since that given by the Supreme Court of Minnesota in Banning v. Sibley, 3 Minn. 282:

> "The definition of the word as given by lexicographers is 'the exclusive right of possessing, enjoying, and disposing of, a thing; ownership; the thing owned; that to which a person has the legal title, whether in his possession or not.' Such, it is reasonable to presume, is the common understanding of the meaning of the word. * * * In the same general sense has the legislature made use of the term property elsewhere in the statute, as in provisions for taxation, and in defining its use in Section 18, p. 736, Revised Statutes, on crimes and punishments."
>
> Banning v. Sibley, 3 Minn. 282 (at pp. 298 and 299).

The provision making property subject to taxation in the general language of "*All property, real and personal*" was in the statute of 1851, and is now in Section 794 of the Revised Laws of 1905 in different form, as follows: "*All real and personal property.*" This means the same as it did when the Sibley case defined it. Certainly this word "property" was used in its ordinary sense then and now unless that definition controls.

There is much to back this up. Chapter 12, Section 3, of the Revised Statues of the Territory of 1851 was identical with the Public Statutes of 1849-1858 in force at the time of the Sibley decision and contained this definition:

> "The terms 'personal property' and 'personal estate' as used in this chapter shall have the same meaning, and shall, for the purpose of taxation, be construed to include," etc.

Then follows classifications somewhat like the present.

In the General Statutes of the State of Minnesota, Revision of 1866, Chapter 11, Section 2, the following appears:

> "The term 'personal property' includes—1. Every tangible thing being subject of ownership, whether animate or inanimate, other than money, not forming part of any parcel of real property as hereinbefore defined."

But the Revision or Compilation of 1878, Sections 1 and 3, of Chapter XI, contained the same words as were later placed into Chapter 11, Sections 1508 and 1510 of the Revision of 1894, and which now appear in Sections 794 and 797, respectively. Showing that the legislature is back to the same general definition without attempting to follow the revision of 1866, as to *tangible things,*—it puts us upon the general definition.

It is noticeable that the words are pruned down in the different revisions until the word "include" is left to represent "mean."

It is also noticeable that where the term *property* or *personal property* is used in the taxing statute without any attempt to go into details as to what is meant, nothing is said of *ownership;* but that when a term is used as it was in 1866 as

> "every tangible thing," they added: "being subject to ownership."

This is almost conclusive. The reason is simple. *Property* would imply ownership, capable of being *acquired, enjoyed* and *possessed. Every tangible thing* would be limited to ownership without the use of the general term "property," or some other limitation, and to make it the sort of property which

could be *owned*, the legislature made *ownership* a part of the definition. When the usual term of personal property was used in 1859 in its meaning which included the right of ownership or the power to acquire, enjoy and transfer, the specific limitation was not necessary, and when the form of the definition changed back to its present form it again became unnecessary. Personal property which *includes goods*, means the right of *acquisition, enjoyment* and *disposal*, free from the whims of others.

The term ownership itself has these ingredients. The court said in the case of *Atwater v. Spalding*, 86 Minn. 101, 102:

> " 'Owner,' according to Black's dictionary, is the person 'in whom is vested the ownership, dominion, or title of property.' Webster defines an 'owner' as 'one who owns; a rightful proprietor; one who has the legal or rightful title, whether he is the possessor or not.' "

The plain fact is that the legislature knowing of the definition in the Sibley case, and of the language of Mr. Justice Atwater:

> "In the same general sense has the legislature made use of the term property elsewhere in the statute, as in provisions for *taxation*, and in defining its use in Section 18, p. 736, Revised Statutes, on crimes and punishments," page 405 (299).

has been satisfied.

The term "property" as there defined for crimes did not include anything that would cover such *contingent interests* as here claimed to be property, and it was evident to the legislature at least in theory before, and in fact after, that decision, that such were not property in the sense of *garnishment, crimes*, or *taxation*. There are many contingent interests that would not need taxation, but might need definition to prevent crimes.

So the legislature *amended* the definition as to crimes by adding *"and every right interest therein."*

The practical construction of such bodies for so long a time ought to be followed even by the courts unless there is good reason for changing the rules. This is well pointed out in the Maryland tax case, supra.

The London Stock Exchange was organized in 1801, al-

though brokers and traders had congregated together to conduct their operations for more than one hundred years prior to that time.

The Paris Bourse has had a legal character since 1724. Its present building was completed in 1826. The New York Stock Exchange dates from 1817, and in Philadelphia a Board of Stock Brokers possessed a formal organization before that time. The stock exchange as it now exists, cannot be said to have originated at any particular epoch, either in the United States or Europe. It has been *developed step by step by business necessity.*

In the United States a Board of Trade is an association of business men established in most large cities to increase facilities for trading in certain products for the furtherance of commercial interests, enactment of rules to regulate trade, settle disputes, etc.

> Medbury's Men and History of Wall Street, 286.
> Lewis, Stocks, Bonds, etc., page 10.
> 23 Am. & Eng. Enc. of Law, page 750-1, note.
> 4 Am. & Eng. Enc. of Law, 2d ed., 594, and cases.
> Art in Enc. Brittanica, Title Stock Exchange.

In *Stock Exchange v. Board of Trade,* 15 Fed. 847, referring to the Board of Trade of Chicago, organized under a similar statute to that by virtue of which the Chamber of Commerce was incorporated, the Court said:

> "The Board of Trade is a private corporation. * * * It is only an association of merchants dealing in products of the country, who, solely for their own

It is becoming the rule generally with social clubs. For instance, in golf clubs, as we understand it, certificates are issued so that only conditional sales can be made of the memberships in the same way as here, and the club is not obligated to take the person who desires to purchase, and only takes him in upon his own character and responsibility; the membership is incidental. On bad behavior he is "churched."

But the *subject-matter of the tax, the authority for the tax,* the *method of taxing* and the *sort of a tax* that should be placed upon *these memberships would all have to be created*

by either the administrative officers, or the court in order to maintain this tax as "money and credits," as it seems to us. The attorney general's office and the tax commission must have doubts, for they appeared before the committee of the legislature to urge the alleged necessity for the passage of the proposed law to tax such memberships at the 1913 session.

All this means that neither the people, nor the legislature, ever intended to tax this class of conditional or contingent interests in memberships. The people never intended it or they would have made provision for it in the constitution; the legislature never intended it or its definition would have been different, and its method of assessment and classification would have been broader.

Shorter still, let the legislature pass a law for their assessment if, and when, it concludes that the memberships in churches, social clubs, labor unions, Masonic orders, commercial clubs, Elks, clubs, agricultural associations, hardware associations, hay dealers' associations, business men's trade associations, Associated Press, and all other associations of this class should be defined as property and "money and credits," *but not until then.*

The cases generally that have had the question under discussion have treated it as an association of that class, many of them especially so designating. Indeed, we know of none that has not so treated it, and we do not recall ever having seen any.

Our own statute is built upon the theory that it belongs to that class. The code of 1905 includes it along with such class, as do Secs. 6522-38 of the Revision of 1913.

ASSOCIATED PRESS PRECEDENT.

It has been commonly reported and by us urged in the hearings without denial, that the reason the tax commission has not held memberships in the Associated Press taxable is that it submitted the question of their taxability to the Department of Justice and was advised that they were not covered by this same law.

This taxability was before the Court of Appeals of Colo-

rado in *Board of Com. v. Rocky Mt. News Co.*, 61 Pac. 494, and held not taxable even though first assessed at $25,000 and reduced to $20,000; this holding was squarely upon the principle we here urge.

That court, in speaking of the *facts*, pointed out many of the characteristics here,—those that are fundamental.

The Court of Appeals of Colorado, in the Associated Press case, Board of Commissioners v. Rocky Mt. News, 61 Pacific, 494, at 498, says:

> "The membership under consideration more nearly resembles the membership in a voluntary association for mutual benefit, or in a stock board, where the member does not have the privilege of selling or assigning his 'seat' without the consent of the association."

So far as we recollect nobody has ever yet pretended to distinguish the Associated Press memberships from these, upon principle. The means of acquiring, controlling and disseminating among its members useful business information is, of course, of the essence of the Associated Press and desired for that association a sit is of this association under Chapter 138 of the General Laws of 1883, and as shown to the court in the case of Chamber of Commerce v. Wells, 100 Minn. 205, and Board of Trade v. Christine, 198 U. S. 236.

Indeed, this is so in every association of this general class. *The object of the Farmers' Mutual Benefit Association* is to *obtain, regulate,* and *use* information for the *general benefit* of the *members.* The *object* of *every trade association* is to *acquire, systematize* and *use,* for the mutual benefit of the members, the *most modern information upon* the *question.* The principal object of the labor union is to acquire, and keep for the use of, and disseminate among, its members, valuable information. The principal use of the social club is to acquire that information, execution and control which enables its members to get the benefits of advancing their conditions in life, and to get it in a pleasurable way. So we may go down the line to fraternal associations. Even churches do not escape this theory. Religious information is their primary object, but as is the nature of all other such associations, betterment

of the conditions and lives of the members is the end.

In the last analysis, substantially all of the organizations we have mentioned would be greatly curtailed in their operations, their influence and their existence if the business element did not enter with the social one, into the scheme of organization, membership and control. You may say that the golf club is a pleasurable institution, but the average man on the golf course will tell you today that it is economy of time, in concentrated effort and clear mind—he has the pleasure to boot.

The men who really do the big things in the larger cities of the country, in a private way, find it not only a pleasure but a necessity to be members of the leading social clubs, and in the last analysis the answer to the question "why?" would be: "I could not afford not to be; besides, its pleasant."

And so we might go on with all of the institutions which have memberships as distinguished from stock, and especially those, like most of them are, which are discriminating in their *admissions, rigid in their control, and limited* in the *use* which can be made of their *memberships* and in every instance we find some social limit, and moral standard as a means of general advancement.

All this is by reason of the general breadth and culture which the member hopes to obtain as applied to the objects which he has in view, so in every one of these institutions the membership itself is not, primarily, the valuable thing. It is a mere means of enhancing the use of the private character, accomplishments and industry of the individual members. Some of it, of course, by means of the association in its aggregate capacity, but, usually, it is a mere means of advancement of the individual, and joint, object. This is particularly so in the Associated Press, and in associations, generally.

Mere membership in the church does not make a saint of a sinner. Yet it is a good means for his individual sanctity. Membership in the Associated Press does not turn lethargy into literature, but allows the transformation of mind into money. Membership in this association does not turn poverty

into prosperity, but furnishes opportunity to use individual business character, but so does the Press Association and many other associations.

The memberships in these associations generally are owned to a great extent by persons who have in view the advancement of the particular city as they would in investing in any other private corporation, which would be of great benefit to the prosperity of the town; only a comparative few, perhaps thirty to fifty per cent, in a town like Minneapolis, would ever use their memberships with the hope of getting any profit by means of operating upon the exchange. It is clear, therefore, that the allegation in the complaint found true by the judgment:

> "That no one of such memberships is used for profit except by the individual member, and then his profit depends entirely upon the use to which he puts the membership." (Tr., p. 42, fol. 135.)

is in accordance with the history of the subject.

It is evident, also, as alleged, that if the Association should close out, the membership would have no value above the physical assets. This is true generally of all these associations. That is, associations of the class we are discussing which have *memberships* as *distinguished* from *stock*. This is true of a church. When the Great Methodist Church split over the institution of slavery an action was brought in equity to divide its millions of dollars worth of property. That case may be found in Smith v. Swornstedt, 16 Howard, 288, and the memberships in the Methodist church were owned by its members when it came to closing out or having a general division, the same as the memberships in this Chamber would be in equity.

Can it be imagined for a moment (with due respect) that an ardent Methodist could place a price for taxation upon such privileges of the church membership as enhance his hopes for Heaven? Such privileges there, as here, might be much more valuable in some cases than in others. It is no answer to say that church property is exempt from taxation, because the member's property is not exempt from taxation.

And the church does not own the privileges which represent the value of the church membership above its physical assets any more than the Chamber owns such privileges here. The good will of a church or the benefits derived from these privileges could not, any more than they can here, be rightfully determined. It may be that the similarity of their pews mentioned by the court in 2 Daly 329, is more similar to these associations on this particular element, but a pew is worth a great deal more to some members than it would be to others.

Now, the property is owned in equity in case of dissolution, by the members of any other social or fraternal order where there is no stock, but in every instance the matter of privileges is not taxed, although it occupies precisely the same condition. Nor is there a double tax upon their assets. If we should examine the definitions and descriptions of the law applicable to such associations under other names, and for other slightly different purposes generally, there would be no question about this.

In Walter v. Hensel, 42 Minn. 204, the court had under consideration the "Odd Fellows' Mutual Benefit Society," and it there appears that the insurance feature was a strong element in that society.

In the case of Mills v. Rebstock, 29 Minn. 380, the court had under consideration the "United Ancient Order of Druids." It appears from that opinion that the business element was strong in that society.

In Davidson v. Old People's Mutual Benefit Society, 39 Minn. 303, the court had under consideration the relations of the members of that society. It appears that a large element of that was of a business or beneficial nature.

In Scheufler v. Grand Lodge of Ancient Order of United Workmen, 45 Minn. 256, the court had under consideration the memberships in that society, and it appears that the benefits were largely of a business nature.

In Hall v. Merrill, 47 Minn. 260, the court had before it the question of the Masonic Mutual Aid Association and the provision of business benefits there is shown to have been a large element in the association.

Indeed, while there seems to be some difference of opinion as to the origin of the Masonic order among those who are better posted than the writer, it is laid down in 14 Enc. of Law, page 534, that it probably grew out of a mediaeval craft of guilds, formed for economic purposes. Whether this be the true origin or whether it was long before the days of Hamurabi is not very material. The fact is that there are none of these institutions which the legislatures of any of the states or any appellate court has ever *put into any other class than this general class.*

Therefore, the defendants properly admitted by demurrer the allegation of the bill

> "that the memberships in the Associated Press, lodges, fraternal orders, churches, etc., were not taxed in said city, although standing in a similar position; and a discrimination was thereby made, not only unlawfully, but prejudicially as against this plaintiff and the other four hundred forty-nine (449) members of said association by unequally assessing them and taking their property without due process of law, contrary to the state and federal constitutions."
>
> Trans., p. 43, fol. 137.

The value in the acquisition depends upon the character of the individual. The value in use depends upon the business ability of the individual. The premium paid for the substitution of the outside member is not paid without the other conditions can be gotten and like the memberships in all other associations, we have been discussing, this privilege or seat cannot be acquired and used, controlled or transferred either by will or by law except only conditionally (Hyde v. Wood, 94 U. S. 523) and does not come within the limit of property as that term has been used in the law generally or in reference to such general class of associations, or the specific kind of association here under discussion, or in taxing statutes in the language, or in such language as our own, as "money and credits," and they ought not to be, for while in their nature private, yet in fact, like all voluntary associations, their object must tend to uplift the community or it fails.

The uplift is one which comes from purposes other than what are ordinarily known as property, but is more like the

character and standing of an individual in his particular business or profession. We do not tax preachers, doctors, lawyers, professors, or others upon the privilege of carrying on a business generally. We license professional men for a small stipend in order that they may be better regulated. Such members as desire to do a grain business must also be licensed for a small stipend with a bond in order that they may be better regulated by the state (Revised Statutes Minnesota 1913, Section 4589), *but in the last analysis the thing which it is sought here to tax is, in equity, a double taxation upon the buildings and property of the association and to tax the privileges and therefore discriminatory.* None other of the associations are so taxed on their assets, or on memberships, *and in the law the tax of a privilege above the pro rata share of the property which represents nothing except the intangible, conditional ownership dependent upon the whims of the association and the character of the individual and cannot be otherwise treated in fact and ought not to be otherwise ruled in law.*

In conclusion therefore, we submit that the results of this investigation show that the State of Minnesota, through its Assessors, its Equalization Boards and the Decisions of its Courts, taken with the Legislation of its taxing system, has made and enforced laws in this case that deprive these plaintiffs of liberty and property without due process of law and deny to them within its jurisdiction, the equal protection of its laws by reason of taxing these memberships in violation of the following principles:

1. That there is no essential statutory law in Minnesota for the taxation of these memberships for "money and credits."

2. That the Minnesota Statutes, as delimited by the decision of the court in State v. McPhail, in 124 Minn. 398, lack the fundamental legislative elements that are necessary for taxing authority to enable such memberships to be taxed.

3. That it was an unconstitutional decision of the merits of this case, rendered upon "money and credits," to affirm the decision upon the McPhail opinion without applying the dis-

tinguishing features as to the nature and mode of the taxation.

4. That it was an unconstitutional decision of this case to make an affirmance upon the McPhail opinion without applying the distinguishing feature of residence.

5. That it was an unconstitutional decision of this case to affirm it upon the opinion in the McPhail case; or to ignore the dissimilarity of taxation between the two; or to ignore the double taxation, or that other corporations of the same class were not taxed upon their memberships at all, or that no corporation outside of this was taxed upon this mode or theory or with the same unjust and unlawful results either to itself or its members, or that the finding of discriination here be ignored, because the finding in the Duluth record was the opposite.

Respectfully submitted,

H. V. Mercer

Counsel for Plaintiffs in Error.

Dated November 9, 1915.

APPENDIX.

CHAPTER 285, MINNESOTA GENERAL LAWS 1911.

"**Taxation of money and credits.**—Section 1. 'Money' and 'credits' as the same are defined in section 798 'Revised Laws of 1905' are hereby exempted from taxation other than that imposed by this act and shall hereafter be subject to an annual tax of three mills on each dollar of the fair cash value thereof.

"But nothing in this act shall apply to money or credits belonging to incorporated bank situated in this state, nor to any indebtedness on which tax is paid under chapter 328, General Laws of 1907.

"**How listed.**—Section 2. All 'money' and all 'credits' taxable under this act shall be listed in the manner provided in section 816, 'Revised Laws of 1905,' but such listing shall be upon a separate blank from that upon which other personal property is listed.

"**Assessment by assesor.**—Section 3. Before making an assessment of 'money' and 'credits' under this act the assessor shall give seasonable notice to the inhabitants of his district in the manner prescribed in section 808, 'Revised Laws of 1905.' He shall require each individual, co-partnership, company, association or corporation in his district to bring in before a date therein specified and not later than the first day of July a true list of all their 'moneys' and 'credits' taxable under this act.

"**Tax Commission to prepare instruction.**—Section 4. The Minnesota Tax Commission shall annually prepare instructions for bringing in the lists required by the preceding section. They shall prepare and distribute through the county auditors to the assessors a form for the returns which the taxpayers are required to make by this act, and this form shall be printed on a separate sheet, and shall be entirely distinct from the forms prepared for the returns of other classes of property. This form shall require the taxpayer to make a return of the total amount of his 'money' and 'credits' taxable under this act.

"The Minnesota Tax Commission shall cause to be printed and shall furnish assessors blank lists for the return of property taxable under this act, and the assessor shall distribute a blank list to every person liable to taxation.

"**Statement to be made under oath.**—Section 5. The assessor shall in all cases require a person bringing in a list to make oath that it is as nearly correct as he is able to make it and this oath shall be attached to and be a part of such list.

"Such list shall be open to the inspection of the assessor, county auditor, their deputies and clerks, the board of review, the board of equalization, their clerks, the Minnesota Tax Commission and its assistants and clerks,

disclosed to no other person except by order of court, and any assessor or other person who shall disclose such details shall be liable to a fine of not less than one hundred dollars nor more than five hundred dollars. The lists shall be delivered by the assessor to the county auditor and by him preserved.

"**Assesor to accept as true.**—Section 6. The assessors shall receive as true except as to valuation, the list brought in by each person, unless on being thereto required by the assessor he refuses to answer on oath all reasonable and necessary inquiries as to the nature and amount of his property taxable under the provisions of this act.

"**To ascertain particulars of personal estate.**—Section 7. The assessor shall ascertain as nearly as possible the particulars of the personal estate subject to taxation under this act of any person who has not brought in such list, and shall estimate its just value according to his best information and belief. He shall also add thereto fifty per cent of the estimate value of suc hproperty as a penalty; and such estimate, with the penalty of fifty per cent, shall be entered in the valuation books, and shall be conclusive upon any person who has not seasonably brought in a list of his estate unless he can show reasonable excuse for the omission.

"**Assessor to specify the amount of each.**—Section 8. In making such estimate the assessor shall specify the amount of 'money' and 'credits' separately and shall enter the same upon the books furnished under the provisions of section 10 of this act. An error or overestimate, or either, shall not be taken into account in determining whether a person is entitled to abatement, but only the aggregate amount of such estimate.

"**Change of domicile.**—Section 9. After property taxable under the provisions of this act has been legally assessed to any inhabitant of the State of Minnesota, including any executor, administrator, or trustee, an amount not less than that last assessed by the assessor of such district in respect of such property shall be deemed to be the sum assessable, until a true list of such property is brought in to the assessor in accordance with the provisions of section 3, of this act. When a person liable to be taxed for personal property included within the provisions of this act changes his domicile, the assessor of the district to which he removes shall assess him for an amount not less than that for which he was assessed in the district from which he removed, until he files the list required by section 3 of this act. The duties of assessors under this section shall be the same as prescribed in section 858, Revised Laws of 1905, and whoever neglects to perform any duty imposed upon him by this section shall be guilty of a misdemeanor.

"**Taxable property.**—Section 10. Property taxable under this act shall not be included in the valuation list which assessors are required to make under the provisions of section 835, Revised Laws of 1905, but shall be listed in a separate book or in a supplement to the regular assessment book which the county auditor shall provide for each assessor on or before the first day of May each year.

"This book, supplement, shall show the total amount of 'money' and of 'credits' assessed to each taxpayer under the provisions of this act, and shall not disclose further details of his assessment. It shall contain also a summary showing the number of individuals, firms, association, trustees, etc., assessed for such property and the total amount of 'money' and 'credits' taxable under the provisions of this act. When making the return to the county auditor provided for in section 850, Revised Laws of 1905, the assessor shall file this valuation book, or supplement, together with the summary of the same and the listing blanks filled out by each taxpayer assessed under the provisions of this act.

"The county auditor, when compiling the returns required by section 862, Revised Laws of 1905, shall include, under a separate heading the aggregate assessment in each district of property assessed under the provisions of this act.

"**Review of assessment.**—Section 11. The assess ment under this act shall be reviewed and equalized the same as the assessment of other personal property is reviewed and equalized.

"**Computation of county auditor.**—Section 12. The county auditor of each county shall compute the taxes under this act each year against each individual, co-partnership, company, association or corporation and he may include such tax on the personal property tax list with the other personal property tax levied against such individual, co-partnership, company, association or corporation where the assessment is made.

"The tax levied under this act shall be collected by the county treasurer, or sheriff, the same as other personal property taxes are collected.

"**Apportionment of receipts.**—Section 13. All taxes paid to the county treasurer under the provision of this act shall be apportioned, one-sixth to the revenue fund of the State of Minnesota, one-sixth to the county revenue fund, one-third to the city, village or town, and one-third to the school district in which the property is assessed.

"Section 14. This act shall take effect and be in force from and after its passage.

"Approved April 19, 1911."

"CHAMBER OF COMMERCE, ETC."

"**Formation—Purposes**—A corporation may be formed in any county, city, village, or town for the purpose of advancing the commercial, mercantile, manufacturing, or agricultural interest of such municipality; for inculcating just and equtable principles of trade; for establishing, maintaining, and enforcing uniformity in its commercial usages; for acquiring, possessing, and disseminating useful business information; for adjusting the controversies and misunderstandings which may arise between individuals engaged in trade and business; and for promoting the general prosperity of such municipality. (2982.)"

"**Chambers of commerce and boards of trade**—In addition to its ordinary powers, every chamber of commerce or board of trade whose certificate shall state the purpose of its incorporation to be to acquire and disseminate useful business information; to inculcate equitable principles of trade; to establish, maintain, and enforce uniformity in the commercial usages, business transactions, and trade relations of the municipality in which it is located, or of citizens thereof—shall also have power, by and through its committees, boards, and agents, in such manner, not inconsistent with law, as its bylaws or regulations may provide, to arbitrate, adjust, and determine differences between itself and its members, or between any such members, or between any such members and other persons assenting in writing thereto, including the taking of testimony and the rendition of awards as the basis of judicial proceedings, and the enforcement of any such awards, regulations, or bylaws, either by fine or by forfeiture of personal or proprietary rights of members. (2982, 2983.)"

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Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 104.

GEORGE D. ROGERS, A. L. GOETZMAN, AND F. E. CRANDALL, REPRESENTING THEMSELVES AND OTHERS SIMILARLY SITUATED,

Plaintiffs in Error,

vs.

THE COUNTY OF HENNEPIN et al,

Defendants in Error.

In Error to the Supreme Court of the State of Minnesota

BRIEF OF DEFENDANTS IN ERROR.

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WILLIAM J. STEVENSON,
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STATEMENT OF FACTS.

In 1912 the taxing authorities of Hennepin County, Minnesota, assessed for taxation the memberships held by members of the Chamber of Commerce of Minneapolis at Three Thousand Five Hundred Dollars

($3,500) each. This assessment was made against the various persons holding such memberships. The laws of the State of Minnesota, extracts of which are hereinafter printed, provide procedure for the questioning in court of the legality of that assessment. Before the time came when the owners of these memberships could pursue the statutory method of attacking this assessment and the resulting tax, the plaintiffs in error in this case began an action of injunction against the said County of Hennepin and its Treasurer and County Auditor. A demurrer to the complaint in said action was interposed (Tr. of R. p. 45) and the court in which such complaint and demurrer were pending heard arguments upon the question of the legal sufficiency of said complaint as against the objection raised by the demurrer, to-wit: that the complaint did not state facts sufficient to constitute a cause of action. This demurrer was interposed prior to the time within which the statutory method of questioning the assessment of the said memberships of the Chamber of Commerce had arrived.

The District Court, upon the argument of the demurrer, sustained the same. (T. of R. p. 46.) The Plaintiffs in error deciding to rely upon their complaint did not plead over or amend their complaint, and, on August 28, 1913, judgment was entered to the effect that "plaintiffs take nothing by this action." (T. of R. p. 47.) From this judgment Plaintiffs in error appealed to the Supreme Court of the State of Minnesota. (Tr. of R. p. 48.) This appeal was heard by the Su-

preme Court on the 12th day of December, 1913. The record of the Supreme Court of Minnesota (Tr. of R. p. 1) shows that "this case came on to be heard this day (December 12, A. D. 1913) upon the return to the appeal herein. Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement."

In the meantime another case involving the question of the right of taxation of memberships in Chambers of Commerce, to-wit: the Duluth Board of Trade, had come up in advance of this action to said Supreme Court and was heard on that day and submitted to that Court along with the case now before this Court. The opinion written at length in the case involving the taxation of memberships in the Board of Trade of Duluth was filed January 23, 1914. In the opinion in the case at bar the Court stated that "the decision in the Duluth case, filed herewith, controls this." (Tr. of R. p. 9.)

Thereupon judgment was entered in the Supreme Court of the State of Minnesota to the effect that "the judgment of the court below herein appealed from be and the same hereby is in all things affirmed." (Tr. of R. p. 2.)

The further facts in this case are necessarily those contained in the original complaint in this action (Tr. of R. p. 41-45) which facts do not need to be restated in this brief.

Brief of Argument of Defendants in Error.

It seems advisable to discuss the numerous assignments of error and the varied and somewhat unclassified arguments of the plaintiffs in error under a different arrangement or analysis than plaintiffs in error have used. It is not the intention of the defendants in error to overlook or ignore any of the arguments or theories of the plaintiffs in error. The primary propositions advanced in this brief are as follows:

There is no Federal question involved in this action. No right guaranteed by the Federal Constitution to the plaintiffs in error has been invaded in this case.

1. There is ample statutory authority for taxing this class of property in Minnesota and the State statutes have been interpreted by the State Supreme Court to include such property. This raises no Federal question.

2. The short per curiam opinion of the State Supreme Court was in itself no denial of due process of law or of equal protection of the laws.

3. The complaint fails to show any unequal protection of the law or unjust discrimination which would entitle plaintiffs in error to the injunctional relief asked.

A. Plaintiffs in error had at all times an adequate remedy at law.

B. Whether such property was properly listed by the assessor for taxation as "moneys and credits" is immaterial here.

C. The claim that the local assessor failed to list other like property does not show that plaintiffs in error were prejudiced thereby.

D. The claim of double taxation amounts at most only to over-valuation and is immaterial here.

E. Residence of one plaintiff in error outside the taxing district or the State does not of itself show that in this action there has been any depriving of such party of a Federal right.

These will be re-stated as they are hereinafter discussed and elaborated.

THERE IS NO FEDERAL QUESTION INVOLVED IN THIS ACTION. NO RIGHT GUARANTEED BY THE FEDERAL CONSTITUTION TO THE PLAINTIFFS IN ERROR HAS BEEN INVADED IN THIS CASE.

The only provisions of the Federal Constitution sought to be invoked in this case are those promising the plaintiffs due process of law and equal protection of the law. Neither of the rights guaranteed by these provisions has been in any way invaded by the refusal of the State courts to give the plaintiffs a temporary or a permanent mandatory injunction.

I. THERE IS AMPLE STATUTORY AUTHORITY FOR TAXING THIS CLASS OF PROPERTY IN MINNESOTA AND THE STATE STATUTES HAVE BEEN INTERPRETED BY THE HIGHEST COURT IN THE STATE TO INCLUDE SUCH PROPERTY. THIS RAISES NO FEDERAL QUESTION.

The State Supreme Court in its opinion (Tr. of R. Pages 10 to 16) found no difficulty in deciding; first, that a membership in a Board of Trade was property, and, second, that it was taxable under the Minnesota Constitution and statutes. These constitutional and statutory provisions are all accurately referred to and quoted in part in said opinion, but for the use of this court they are here set forth at length. The Constitution from the time of its adoption, when Minnesota became a State in 1858 until it was amended by the Legislature and a vote of the people in 1906, provided as follows:

SECTION 1 OF ARTICLE 9 OF THE CONSTITUTION OF MINNESOTA (PRIOR TO THE AMENDMENT OF 1906).

All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation and be equalized and uniform throughout the state; * * *.

SECTION 3 OF ARTICLE 9 OF THE CONSTITUTION OF MINNESOTA (PRIOR TO THE AMENDMENT OF 1906).

Laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property, according to its true value in money; but public burying

grounds, public school houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property used for religious purposes, and houses of worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value two hundred dollars for each individual, shall, by general laws, be exempt from taxation.

In 1906 said Constitutional provisions, among others, were superseded by the following:

SECTION 1 OF ARTICLE 9 OF THE CONSTITUTION OF MINNESOTA (AS AMENDED IN 1906).

The power of taxation shall never be surrendered, suspended or contracted away. Taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes, but public burying grounds, public school houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property, and houses of worship, institutions of purely public charity, and public property used exclusively for any public purpose, shall be exempt from taxation, and there may be exempted from taxation personal property not exceeding in value $200, for each household, individual or head of a family, as the legislature may determine; provided, that the legislature may authorize municipal corporations to levy and collect assessments for local improvements upon property benefited thereby without regard to a

cash valuation, and provided further, that nothing herein contained shall be construed to affect, modify or repeal any existing law providing for the taxation of the gross earnings of railroads.

The statute that is almost as old as the Constitution itself has continuously provided substantially as follows:

SECTION 794 REVISED LAWS OF MINNESOTA FOR 1905.

All real and personal property in this state, and all personal property of persons residing therein, including the property of corporations, banks, banking companies, and bankers, is taxable, except such as is by law exempt from taxation.

Plaintiffs in error evidently conceded that a membership in a Board of Trade or Chamber of Commerce is property of value or they would not assign as error here that this litigation has resulted in depriving them of "*property* without due process of law." Thus admitting that the membership is property, all that remains for consideration is whether such property is taxable under the Minnesota statutes. The interpretation and conclusion reached by the State Court is final on this point, and such decision involves no federal question. It is plain that the only question raised by plaintiffs in error is one of construction and not of constitutionality of the statute under the State Constitution. It is one involving only the intention and not the power of the Legislature.

In *Columbus Southern Railway v. Wright*, 151 *U. S.* 470, this Court had before it a case much similar to the one at bar. It was a suit for an injunction to restrain the collection of tax, the validity of which had been sustained by the Supreme Court of Georgia. The plaintiffs in error claimed that they had thereby been denied the equal protection of the laws of that state. A demurrer to the complaint had been sustained by the State courts and the case was brought to this court on a writ of error and this court said (Page 475):

> "Upon this writ of error we cannot, of course, review the construction which the Supreme Court of the State has placed upon its own Constitution and the act in question."

In *Games v. Dunn*, 14 *Peters* 322, it was said that laws taxing property are strictly local in their character and that their construction by the State courts should be followed by the courts of the United States with equal, if not greater, strictness than any other class of laws.

> "The construction of a State statute by the Supreme Court of the State involving no question under the laws or Constitution of the United States is conclusive upon us. We accept the construction of State statutes by the State courts, although we may doubt the correctness of such construction. We accept and adopt it, although we may have already accepted and adopted a different construction of a similar statute of another State, in deference to the Supreme Court of that State."
>
> *Erie Ry. Co. v. Penn.*, 21 *Wall.* 492, 497.

See also—

Bailey v. Magwire, 22 *Wall* 215.

Brown-Forman Co. v. Ky., 217 *U. S.* 563.

"The decision of the highest State Court upon the construction to be placed upon the Statute of that State is one this Court is bound to respect."

Adams v. Nashville, 95 *U. S.* 19.

"Even if this Court doubted the wisdom of the State decision, the latter would be regarded as free from error and binding on this Court."

Lane Co. v. Oregon, 7 *Wall* 71.

"Whether the tax is in accordance with the laws of the State is a question on which the decision of the highest court of the State is conclusive. The only question of which this Court has jurisdiction is whether the tax was in violation of the Federal Constitution."

Pullman Car Co. v. Pa. 141 *U. S.* 18.

See also—

Central Pacific Railroad v. Nevada, 162 *U. S.* 512.

Stryker v. Goodnow, 123 *U. S.* 527, 538.

In *Horn Silver Mining Company v. New York*, 143 *U. S.* 305, an attempt was made to have this court consider the decision of a state court holding that New York might assess a tax against the whole capital stock of a foreign corporation which was engaged chiefly in mining operations in another state and doing only a small part of its business in New York. This court held that even though such taxation resulted in apparent

hardship, the case was one that presented no Federal question and was neither the taking of property without due process of law nor was it a denial of equal protection of the law.

Minnesota Statutes and the decisions of her Supreme Court construing and applying them have been before this court on other occasions and this same rule has been applied.

In *Winona & St. Peter Land Company v. Minnesota*, 159 *U. S.* 526, it is said:

> "That the tax proceedings were in substantial conformity with the provisions of the Minnesota Statutes and that there is nothing in those Statutes in conflict with the State Constitution, is settled for this Court adversely to the plaintiff in error by the decision of the Supreme Court of the State."

See also to the same effect—

U. S. Express Company v. Minnesota, 223 *U. S.* 335.

2. THE SHORT PER CURIAM OPINION OF THE STATE SUPREME COURT WAS IN ITSELF NO DENIAL OF DUE PROCESS OF LAW OR OF EQUAL PROTECTION OF THE LAWS.

Briefly stated, the argument of plaintiffs in error on this feature of the situation is that the State Supreme Court either overlooked the differences between the case at bar and the McPhail case referred to in the per curiam and filed at the same time, or if such differences were not overlooked, the court failed to explain the process of reasoning it used in reaching its conclusion.

The McPhail case involving the taxation of membership in the Duluth Board of Trade was presented and argued before the State Supreme Court on December 12, 1913, and evidently the parties in the case at bar were desirous of having their case advanced on the calendar and argued and submitted in connection with the Duluth case. Preliminary to such arrangements, the parties in the case at bar made a Stipulation which was not sent to this court as a part of the original record, but has since been sent as supplementary to that record pursuant to the Stipulation of the parties herein, and in accordance with that Stipulation said previous Stipulation in the State Supreme Court is here set forth at length.

STATE OF MINNESOTA
IN SUPREME COURT
OCTOBER TERM, 1913.

GEORGE D. ROGERS (and as amended) A. L. GOETZMAN AND F. E. CRANDALL,

Appellants,

vs.

COUNTY OF HENNEPIN, HENRY C. HANKE, as its County Treasurer, and individually, and AL P. ERICKSON, as County Auditor of said county and individually,

Respondents.

IT IS HEREBY STIPULATED by and between the parties in the above entitled action, through their respective counsel, that

WHEREAS, it is impossible for the above entitled case to be set for argument during the present year, except in the case involving the Duluth memberships, and

WHEREAS that matter is to be orally argued on the 12th day of this month and involves the principle question as to the general taxability of memberships of the kind in question,

NOW THEREFORE, it is hereby agreed that the above case may be advanced until the 12th day of December, 1913, for argument with the Duluth case, and that the

appellant in the Duluth case may grant to the appellant in this case a portion of his time for oral argument, and that the defendant in this case will submit its side upon the argument made in the Duluth case, and the brief which it will itself file, as nearly the 12th as possible and within ten days thereafter.

Dated December 10, 1913.

MERCER, SWAN & STINCHFIELD,

Attorneys for Appellants.

R. S. WIGGIN,

Attorney for Respondents.

(Endorsed) Filed Dec. 11, 1913.

I. A. Caswell, Clerk.

It is a significant fact that in the above Stipulation the plaintiffs in error considered that the principal question involved in the case was—

> "The general taxability of memberships of the kind in question."

They submitted their case with the Duluth case, committing it to the State court to abide the course and conclusion of the Duluth case. They apparently were relying primarily upon the main and common issue of whether memberships in such Board of Trade or Chambers of Commerce were taxable property.

If the plaintiffs in error or appellants in the State Supreme Court were dissatisfied with the disposition that court made of their case in the per curiam opinion and had any belief that such court had fallen into any manifest error of fact, or had overlooked the salient or

essential differences between their case and the Duluth case, thus changing the decision against them, their remedy would be by making an application for a rehearing under Rule XXX of that court, which reads as follows:

> "Applications for re-hearing shall be made ex parte on petition, setting forth the grounds on which they are made, and filed within ten (10) days after the filing of the decision."

The granting of re-hearings by this court was laid down in the early case of *Derby v. Gallup*, 5 *Minn.* 119, as follows:

> "The applicant must be able to show some manifest error of fact, into which counsel or the court have fallen in the argument or decision of the case; as, for example, that a provision of statute decisive of the case has, by mistake, been entirely overlooked by counsel and the court; or, perhaps, that a case has been decided upon a point not raised at all upon the argument, and there be strong reason to believe that the court has erred in its decision; or, unless, in a case where great public interests are involved, and the case has either not been fully argued, or strong additional reasons may be urged, to show that the court has erred in its ruling."

This has been followed with approval in later cases, viz:

Weller v. City of St. Paul, 5 *Minn.* 95.

Bradley v. Gamelle, 7 *Minn.* 331.

Warner v. Lockerby, 31 *Minn.* 421.

Densmore v. Shepard, 46 *Minn.* 54.

Fajder v. Aitkin, 87 *Minn.* 445.

Kelly v. Liverpool, etc. Co., 102 *Minn.* 178.

In cases where the court has fallen into some manifest error as to a fact appearing in the record and materially affecting the decision, a rehearing will be allowed.

Lough v. Bragg, 19 *Minn.* 357.

Minneapolis T. Co. v. Eastman, 47 *Minn.* 301.

Smith v. Glover, 50 *Minn.* 58.

Rud v. Pope County, 66 *Minn.* 358.

Fowler v. Jenks, 90 *Minn.* 74.

Where the court overlooked an important aspect of the facts, a re-hearing will be allowed:

State v. Gut, 13 *Minn.* 341.

Redwood County v. Winona, etc. Co., 40 *Minn.* 512.

Peet v. Sherwood, 47 *Minn.* 347.

Armstrong v. St. P., etc. Co., 48 *Minn.* 113.

But it will not be presumed that the court overlooked any essential facts or any applicable provisions of law. If the facts appear in the record and the legal principles were urged in either brief or oral argument, they must be presumed to have been considered by that Court when the case reaches this Court. The principal case relied upon by plaintiffs in error is ample authority to defeat their contention and to sustain the above statements, viz: *Fayerweather v. Ritch*, 195 *U. S.* 276. In that case a statute of Mortmain of New York made invalid a residuary devise to trustees for the benefit of colleges. The devise could be sustained only if releases executed by the heirs were free from fraud and therefore valid. The special term sustaining the trust made no finding

of fact and its opinion did not indicate that it had decided this necessary question. The Judge, six years after the trial, testified that he had not considered that question in reaching the conclusion, but this testimony was excluded. The General Term and the Court of Appeals in New York said this question was necessarily decided by the first court. In the U. S. Circuit Court, a plea of res adjudicata was sustained, and this was affirmed in this court. Therefore, if the features of difference between the case at bar and the McPhail case were *necessary* or material facts for the State Supreme Court to consider in reaching a decision, it must be conclusively presumed that they were so considered.

It is indeed a novel proposition if courts must always explain fully their reasons for reaching their conclusions. Litigants are not entitled, as a matter of right, to any opinion from the court which shows the principles applied, the facts considered, the precedents followed, or the reasoning used.

In *Houston v. Williams*, 13 *Cal.* 24, Mr. Justice Field delivered the opinion of the court holding a statute unconstitutional which *required* Judges in cases on appeal to write and file opinions containing the reasons for their decisions, and a motion to require the court to file such an opinion upon reversing a case was denied.

In *Missouri, etc. Railway Co. v. Holschlag*, 144 *Mo.* 253, it was held entirely optional with the Judge whether or not he would write an opinion.

In *Parker v. Atlantic, etc., Railway Co.*, 133 *No. Car.* 335, while holding that it is under no obligation to file an opinion, the court consented to do so upon request.

In *Ex Parte Flowers*, 146 *Pac. Rep.* 914 (*Okla.* 1915), a majority of the court agreed that a writ of habeas corpus should be granted. They could not agree upon the reasons therefor, and so wrote no opinion.

See also—

Letzkus v. Butler, 69 *Pa. State* 277.

In *Speight v. People*, 87 *Ill.* 595, the court says:

> "Without great injustice to other interests, it is impossible that our whole time shall be given to a single class of questions and we have not therefore deemed it our duty when we have reached a conclusion with which we are satisfied upon any question affecting a class of cases, to answer, at length, and expose what we deem a fallacy in every subsequent argument in which counsel may imagine that they have successfully demonstrated the inaccuracy of our conclusions."

If the plaintiffs in error were not entitled as a matter of right to more than a per curiam opinion, it necessarily follows that there has been no depriving of due process of law or a denial of equal protection of the laws.

As heretofore stated, whether the conclusion of the State Court was right or wrong, it presents no Federal question in this case; but it is not conceded nor is it apparent, or even possible, that the points of difference between the case at bar and the Duluth case were at all material or that their existence should or could have

led to any different conclusion than was reached by the State Courts. This proposition is fully covered in the next subdivision.

3. THE COMPLAINT FAILS TO SHOW ANY UNEQUAL PROTECTION OF THE LAW OR UNJUST DISCRIMINATION WHICH WOULD ENTITLE PLAINTIFFS IN ERROR TO THE INJUNCTIONAL RELIEF ASKED.

This was an action for a temporary and permanent mandatory injunction against the county auditor who had extended the tax and the county treasurer who had the tax rolls in his possession for collection, and against the county of Hennepin, in which the assessment was made. The trial court sustained the general demurrer of the defendants interposed on the ground that the complaint did not state facts sufficient to constitute a cause of action. (Tr. of R. page 45-46.) The plaintiffs in error did not plead over or amend their complaint after the sustaining of the demurrer. Three months after the demurrer was sustained, the lower court ordered the entry of judgment against the plaintiffs upon the issues of law raised by the demurrer and decided adversely to them. (Tr. of R. Page 47.)

The plaintiffs evidently were content to have the case disposed of on the demurrer which challenged the sufficiency of the complaint as a pleading, seeking equitable relief.

A. *Plaintiffs in error had at all times an adequate remedy at law.*

If the complaint did not show upon its face by facts well pleaded that it was within the equitable jurisdiction of the court, then no matter what might be the validity or invalidity of the tax thus assailed, the court properly refused the equitable relief.

The sufficiency of this pleading cannot be said to be a Federal question, but for the purpose of showing that the district court or trial court gave the plaintiffs a full hearing and adequate consideration of their matters of grievance, and that the State Supreme Court did likewise, this further analysis may not be immaterial.

Plaintiffs in error claimed that there were three or four points, facts or conditions involved in their case which were different, or additional, to the facts in the McPhail or Duluth case. The defendants in error contend that these differences were of no moment, were unworthy of any consideration by the State Supreme Court, *and if considered could not possibly have changed the decision in the case at bar.*

If the plaintiffs in error had an adequate remedy at law, there was no occasion for invoking the equitable powers of the court.

The Minnesota statutes have always provided in substance for the following procedure in personal property tax matters

On the first Monday in January the tax rolls are given the county treasurer for collection. All payments of taxes made to the county treasurer are voluntary and he takes no steps toward enforcing payment, except as hereinafter mentioned.

On the fifth secular day of April the Treasurer makes a list of all unpaid taxes remaining delinquent on April 1st, which list he files with the clerk of the District Court.

Within ten days thereafter, any person whose name is in such list may file a verified answer with such clerk of court, "setting forth his defense or objection to the tax or penalty against him."

The issues raised by this answer are tried by the court at some succeeding term of court and judgment rendered accordingly.

If no answer is filed a tax citation is issued by the clerk, directed to the sheriff, requiring the delinquent taxpayer to appear on the first day of the next general term not less than thirty days thereafter and show cause, if any there be, why he should not pay said tax and penalty. This citation is served by the sheriff in the same manner as a summons in an ordinary civil action. The taxpayer then has a second opportunity to plead and present his defenses to the tax in the court of general jurisdiction in the State.

If answers are not filed within the specified time on this second opportunity, a default money judgment is entered against the delinquent taxpayers who have been served with such citation. This is a personal judgment.

This judgment is docketed in the same manner as any other money judgment and is a lien of equal rank and validity. The principal sections of the statute providing for this procedure are as follows:

SECTION 878, REVISED LAWS OF 1905.

On or before the first Monday in January, in each year, the county auditor shall deliver the lists of the several districts of the county to the county treasurer, taking therefor his receipt, showing the total amount of taxes due upon the lists. Such lists shall be authority for the treasurer to receive and collect taxes therein levied.

SECTION 879, REVISED LAWS OF 1905.

The county treasurer shall be the receiver and collector of all the taxes extended upon the tax lists of the county, * * * etc. etc. etc.

SECTION 889, REVISED LAWS OF MINNESOTA FOR 1905.

On the fifth secular day of April of each year the county treasurer shall make a list of all personal property taxes remaining delinquent April 1, and shall immediately certify to and file the same with the Clerk of the District Court of his county, and upon such filing the list shall be prima facie evidence that all the provisions of law in relation to the assessment and levy

of such taxes have been complied with. On or before the tenth secular day next thereafter any person whose name is embraced in such list may file with the clerk an answer, verified as pleadings in civil actions, setting forth his defense or objection to the tax or penalty against him. The answer need not be in any particular form, but shall clearly refer to the tax or penalty intended, and set forth in concise language the facts constituting his defense or objection to such tax or penalty. The issues raised by such answer shall stand for trial at any term of court in such county in session when the time to file answers shall expire, or at the next general or special term appointed to be held in such county; and, if no such term be appointed to be held within thirty days thereafter, then the same shall be brought to trial at any general term appointed to be held within the judicial district, upon ten days' notice. The county attorney of the county within which such taxes are levied, or if there be none, of the county within which such proceedings are instituted shall prosecute the same. At the term at which such proceedings come on for trial they shall take precedence of all other business before the court. The court shall without delay and summarily hear and determine the objections or defenses made by the answers, and at the same term direct judgment accordingly, and in the trial shall disregard all technicalities and matters of form not affecting the substantial merits. If the taxes and penalties shall be sustained, the judgment shall include costs.

SECTION 891, REVISED LAWS OF MINNESOTA FOR 1905.

Sections 888-890 shall not deprive any taxpayer of the right to pay under protest any tax claimed to be unjust or illegal; and to bring an action for the recovery of the same in any case where such remedy is now allowed by law.

SECTION 893, REVISED LAWS OF MINNESOTA FOR 1905.

Within ten days after the adjournment of the county board, the auditor shall file a copy of such revised list with the clerk of the district court, and within ten days thereafter the clerk shall issue a citation to each delinquent named in the list, stating the amount of the tax and penalty, and requiring such delinquent to appear on the first day of the next general term of the district court in the county, appointed to be held at a time not less than thirty days after the issuance of such citation, and show cause, if any there be, why he should not pay such tax and penalty. The citation shall be delivered for service to the sheriff of the county where such person may at the time reside or be. If such person, after service of the citation, fails to pay such tax, penalty and costs to the sheriff before the first day of the term, or on said day to show cause as aforesaid, the court shall direct judgment against him for the amount of such tax, penalty and costs. When the sheriff is unable to serve the citation, he shall return the same

to the clerk, with his return thereto to that effect, and thereupon, or if the court decides that the service of such citation made or attempted to be made, or the issuance thereof by the clerk, was illegal, the clerk shall issue another like citation, requiring such delinquent to appear on the first day of the next general term to be held in the county, and show cause as aforesaid, and, if he fails to pay or to show cause, the court shall direct judgment as aforesaid. Whenever the sheriff has been unable to serve any such citation theretofore issued in any year or years, or whenever the court decides that the service of any such citation theretofore made or attempted to be made, or the issuance thereof by the clerk, was illegal, the clerk shall issue another like citation requiring such delinquent to appear, as in the case last provided, and with like effect; Provided, that all citations other than the first shall be issued only on the request of the county attorney.

SECTION 896, REVISED LAWS OF MINNESOTA FOR 1905.

The citation shall be prima facie evidence that all the provisions of law in relation to the assessment and levy of taxes have been complied with. No omission of any of the things by law provided in relation to such assessment and levy, or of anything required by any officer to be done prior to the issuance of such citation, shall be a defense or objection to such taxes, unless it be also made to appear to the court that such omission has resulted to the prejudice of the party objecting, and

that such taxes have been unfairly or unequally assessed; and in such case, but no other, the court may reduce the amount of such taxes, and give judgment accordingly. It shall, however, always be a defense to such taxes that the same have been paid, or that the property upon which the same were assessed was not subject to taxation.

SECTION 901, REVISED LAWS OF 1905.

Every judgment for personal property taxes shall be docketed, and thereafter shall become a lien upon the real property of the debtor in the county within which the judgment was rendered, to the same extent as other judgments for the recovery of money, and may be docketed in other counties in like manner and with like effect.

It has long been the unbroken rule in Minnesota that injunction will not lie to restrain the collection of personal property taxes on the ground that they are illegal.

Clarke v. Ganz, 21 *Minn.* 387.

Weibeler v. Sullivan, 34 *Minn.* 317.

Laird v. Pine County, 72 *Minn.* 409.

State v. Dunn, 86 *Minn.* 301.

Nor will an action of injunction lie merely because many taxpayers are similarly situated and a single action would establish a precedent and settle a question as to all of them.

Bradish v. Lucken, 38 *Minn.* 186.

In the McPhail or Duluth case, which raised the question of the taxability of memberships in Boards of Trades and other like organizations, the taxpayer, McPhail, used the statutory procedure for presenting his grievances. (Tr. of R. Pg. 10, Folio 68.) This of itself shows that the statutory proceeding was adequate and the state courts were justified in deciding that it was the exclusive method of contesting the validity of the tax in ordinary cases.

In *Waters-Pierce Oil Company v. Texas*, 212 *U. S.* 106, this court held that the judgment, or decision of a State court does not involve a Federal question, for the record shows that the judgment can stand upon other grounds free from objection so far as the Federal rights are concerned. The decision in the case at bar may well stand upon the ground that the plaintiffs in error had an adequate remedy at law.

This manner of disposing of an application for an injunction to test the validity of a tax has been sanctioned and approved by this court in *Dalton Machine Company v. Virginia*, 236 *U. S.* 699, 700, where it was said in substance that the plaintiffs might well wait for the ordinary course of the law.

Northern Pacific Railroad v. Patterson, 154 *U. S.* 130, was an action for injunction to restrain county officials from selling certain lands for taxes on the ground that such lands were not taxable. A general demurrer to the complaint was sustained and judgment was entered

against the plaintiff, which judgment was affirmed in the Montana Supreme Court. This case is therefore strikingly parallel with the case at bar. It was there held that it was for the State court to determine whether the statutory remedies for excessive valuation or other correction of errors in taxation was exclusive or cumulative, and in denying the injunction, the said court held the former, and such decision presented no Federal question. It was there said:

> "But it was for the Supreme Court of Montana to determine whether the Statute was exclusive and whether the plaintiff came within its terms or not, and its action in that regard raises no Federal question for our consideration."

In *Pacific Express Company v. Seibert*, 142 *U. S.* 339, it was held that where a complaint for an injunction proceeds upon the primary and fundamental ground, that the tax is unlawful, then there is no right to an injunction and that plaintiff must go further and show that there will be a multiplicity of suits, or other irreparable injury to plaintiff.

It is true that it is alleged in the complaint in the case at bar that an injunction is sought to avoid a multiplicity of suits. (Tr. of R. Pg. 44, Fol. 138.) The numerous suits here referred to are those which the county or state may be obliged to bring against the various members of the Minneapolis Chamber of Commerce. There are no numerous suits against these particular plaintiffs, only one suit could possibly be brought against each plaintiff, and doubtless the final

decision in one case would satisfy all members and all parties as to the validity or invalidity of the tax. It is an elementary principle of equity that the complainant, in order to invoke the jurisdiction of a court of equity, must be the party threatened with a multiplicity of suits, and not that the defendant may be subject to a multitude of suits against other parties.

Simkins A Federal Equity Suit, page 30.

Bradish v. Lucken, 38 *Minn.* 186.

In *Thomas v. Council Bluffs Canning Company*, 92 *Federal*, 422, the Circuit Court of Appeals (Caldwell, Sanborn and Thayer, JJ.), applied this principle in an action brought by a stockholder on behalf of himself and of the other stockholders to enforce a contract made by the corporation. The ground of equity was to avoid a multiplicity of suits, and it was there held (page 423) that the fact that the *defendant* might be subjected to a number of legal actions offers no ground for a resort to equity by a complainant where but a single action would be required to which he would be a party, or in which he would have any interest. The court said:

> "The multiplicity of suits which confers jurisdiction in equity, is a multiplicity of suits to which the complainant will be a party. A multiplicity of suits against defendant to which he will not be subjected, and in which he has no interest, furnishes no ground for his resorting to equity."

In *Boise Artesian Hot & Cold Water Company v. Boise City*, 213 *U. S.* 276, this court said that the avoiding of a "multiplicity of suits" was not available to a plaintiff unless clearly necessary to protect the *plaintiff* against continued and vexatious litigation.

In *Equitable Life Assurance Society v. Brown*, 213 *U. S.* 25, this court said that a complainant could not urge as a ground for jurisdiction that defendant will be saved a multiplicity of suits.

Where the state court has dismissed an equitable action, whatever might have been the reasons for the decision, the question whether the state court had jurisdiction of the case was a question exclusively for the state tribunals, and presents no Federal question.

Smith v. Adsit, 16 *Wallace*, 185.

The plaintiffs in error have not been deprived of due process of law in this action; they have not even been deprived of the defenses which they claim the state courts failed to consider. This injunction suit did not terminate in a judgment for taxes. It was still necessary for Hennepin County to include these taxes in its delinquent list and its citations and to have the latter served upon these plaintiffs if possible, before a judgment could be entered for these taxes.

All that was adjudicated in the case at bar was: First: That such memberships were taxable property under the Minnesota statutes and constitution. Second: That the plaintiffs were not entitled to equitable relief.

The latter was equivalent to saying in this case that they had not shown that they had no adequate remedy at law. The point of difference so often asserted by plaintiffs in error in their brief between their case and the McPhail or Duluth case have none of them been adjudicated up to this time. They are hereinafter discussed separately, but they are, nevertheless still available defenses which might or may have been imposed in the subsequent statutory proceedings in Hennepin County.

It is an elementary principle that where a bill in equity has been dismissed on demurrer, the dismissal does not amount to an adjudication on the merits, unless it *affirmatively appears* that such merits or features were considered by the Court.

The question must be one directly and necessarily involved in the conclusion reached by the Court, or that question will not be res adjudicata. The judgment is not conclusive as to matters which might have been tried, but only as to matters which were in fact tried.

Last Chance Mining Co. v. Tyler Mining Co., 157 *U. S.* 687.

Russell v. Place, 94 *U. S.* 606.

De Sollar v. Hanscome, 158 *U. S.* 221.

Wiggins Ferry Co. v. O. & M. Ry. Co., 142 *U. S.* 397.

II.

WHETHER SUCH PROPERTY WAS LISTED BY THE ASSESSOR FOR TAXATION AS MONEYS AND CREDITS IS IMMATERIAL HERE.

This objection of plaintiffs in error relates wholly to the form in which the assessor listed the property for taxation. If he did not enter it under the proper classification, it was at most, an irregularity. The section of the Minnesota statutes relating to unprejudicial irregularities or errors of form is as follows:

SECTION 800, REVISED LAWS OF MINNESOTA FOR 1905.

No assessment of property for the purpose of taxation, and no general or special tax authorized by law, levied upon any property by any officer or board authorized to make and levy the same, shall be held invalid for want of any matter of form in any proceeding which does not affect the merits of the case, and which does not prejudice the rights of the party objecting thereto. All such assessments and levies shall be presumed to be legal until the contrary is affirmatively shown; and no sale of real estate for the non-payment of taxes thereon shall be rendered invalid by showing that any certificate, return, affidavit, or other paper required to be made and filed in any office is not found in such office, but, until the contrary is shown, the presumption shall

be in all cases that such paper was properly made and filed

The sections relating generally to the duties of the assessor and the way he shall discharge them in the listing of property, are as follows:

SECTION 808, REVISED LAWS OF MINNESOTA FOR 1905.

The assessor shall perform his duties during May and June of each year, except in cases otherwise provided, and in the manner following: He shall actually view, when practicable, and determine the full and true value of each tract or lot of real property listed for taxation, and shall enter the value thereof, including the value of all improvements and structures thereon, opposite each description. He shall make an alphabetical list of the names of all persons in his town or district liable to an assessment of personal property, and shall call at the office or place of business or residence of each person required by this chapter to list property, and shall list his name, and shall require each person to make and deliver a correct list and statement of such property, according to the prescribed form, which shall be subscribed and sworn to by the person listing; and the assessor shall thereupon determine the value of the property in such statement, and enter the same in his assessment books, opposite the name of the person assessed, with the name and postoffice address of the person listing the property, and, if he reside in a city, the street and number, or other brief description, of his

residence or place of business. If any property is listed or assessed on or after the fourth Monday of June, and before the return of the assessor's books, the same shall be as legal and binding as if listed and assessed before that time.

SECTION 810, REVISED LAWS OF MINNESOTA FOR 1905.

All property shall be assessed at its true and full value in money. In determining such value, the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation, nor shall he adopt as a criterion of value the price for which the said property would sell at auction or at a forced sale, or in the aggregate with all the property in the town or district; but he shall value each article or description of property by itself, and at such sum or price as he believes the same to be fairly worth in money. In assessing any tract or lot of real property, the value of the land exclusive of structures and improvements shall be determined, and also the value of all structures and improvements thereon, and the aggregate value of the property, including all structures and improvements, excluding the value of crops growing upon cultivated land. In valuing real property upon which there is a mine or quarry, the same shall be valued at such price as such property, including the mine or quarry, would sell for at a fair, voluntary sale, for cash. Taxable leasehold estates shall be valued at such a price as they would bring at a fair, voluntary

sale for cash. Money, whether in possession or on deposit, shall be entered in the statements at the full amount thereof. Every credit for a sum certain, payable either in money, property of any kind, labor, or services, shall be valued at the full price of the same so payable; if for a specific article, or for a specified number or quantity of any article of property, or for a certain amount of labor, or for services of any kind, it shall be valued at the current price of such property, or for such labor or services, at the place where payable.

The statute relating to listing of moneys and credits is printed in full in the appendix to the brief of the plaintiffs in error (p. b. 95-97).

The bill of complaint in this action fails to allege that because of this property being thus assessed as moneys and credits, the resulting tax is any larger than it would be if the property were assessed under any other class. If the act of the assessor was not prejudicial to the complainants, it affords no ground for equitable relief.

Moreover, it was through no oversight of the pleader that the complaint contains no allegation that the assessing of the memberships as moneys and credits was prejudicial to the plaintiffs. Moneys and credits are assessed under Chapter 285, Laws of Minnesota for 1911, above referred to, at three mills on the dollar.

The Supreme Court of the State of Minnesota in *State ex rel. Winona Motor Company v. Minnesota Tax Commission*, 117 *Minn.* 159, held that there was an

apparent legislative reason for so classifying moneys and credits for purposes of taxation and subjecting them to a much *lower* rate of taxation than the rate applicable to the rest of the property in the State.

This Court in *Travelers Insurance Co. v. Connecticut*, 185 *U. S.* 364, 368, said:

> "The general effect of the law is a matter of common knowledge."

And using that proposition this Court then states what did not apparently appear in the record, namely: the average tax rate of towns in Connecticut. Upon this authority the defendants in error quote from the Abstract of Tax Lists for the year 1912, found in the State Auditor's Biennial Report for the years 1913-1914, page 604, to the effect that the average tax rate in Hennepin County in 1912 was 37.58 mills. Surely the taxing of these memberships at three mills on the dollar instead of 37.58 mills was no prejudicial error that should engage the time of this Court or of any other court.

C.

The claim that the local assessor failed to list other like property does not show that plaintiffs in error were prejudiced thereby.

It is alleged in the complaint (Tr. of R. p. 43, Folio 137) that "if such memberships (in the Minneapolis Chamber of Commerce) were property in the general sense, that the memberships in the Associated Press,

Lodges, Fraternal Orders, Churches, etc., were not taxed in said city although standing in a similar position."

This is really an argumentative allegation of law to the effect that memberships in such other organizations were the same class of property as memberships in the Minneapolis Chamber of Commerce. Not being an allegation of fact it is not admitted by the demurrer.

Furthermore it is far short of an allegation showing that any particular amount of property was thus escaping taxation to the prejudice of the plaintiffs, or that such memberships in other organizations had any actual taxable value. Even had it been shown that any specific amount of property, whether similar to the property of the plaintiff or not, was escaping taxation, all that plaintiffs could complain of would be the excess amount of tax consequently imposed upon them because of the failure to include the other property. Injunction will lie only to enjoin the unjust part of a tax based on unequal valuation.

In *First National Bank v. Ayers*, 160 *U. S.* 660, stockholders in a national bank were not allowed to deduct their debts from the value of their shares of stock in the plaintiff bank, but parties owning credits could deduct such debts therefrom, but it is not shown what proportion said credits were of all monied capital in the state, and as there was no claim that such credits were so large and substantial as to amount to an illegal discrimination there was no Federal right invaded.

A bill in equity will lie to enjoin the collection of only that portion of the tax which results from the illegal discrimination.

Atchison, T. & S. F. Ry. Co. v. Sullivan, 173 *Federal*, 456.

Cummings v. National Bank, 101 *U. S.* 153.

Raymond v. Chicago Traction Co., 207 *U. S.* 20.

It is impossible to determine from the complaint in this case to what extent there was any illegal discrimination or that plaintiff's tax was increased in any degree, either substantial or nominal.

D.

The claim of double taxation amounts at most only to over-valuation and is immaterial here.

The assessing to the member or stockholder of the value of his membership or stock, and the assessing to the corporation of the value of all its tangible property does not amount to double taxation.

It was held in *Bank of Commerce v. Tennessee*, 161 *U. S.* 134, that it was not double taxation to tax the capital stock to the corporation and the shares of stock in the hands of the shareholders as they are two distinct pieces of property.

See also—

Van Allen v. Commissioners, 3 *Wall.* 573.

People v. Commissioners, 4 *Wall.* 244.

But even if it were double taxation and the same property has twice been required to contribute taxes, this violates no provision of the Constitution of the United States.

It was said in *Davidson v. New Orleans*, 96 *U. S.* 97:

> "It is said that the plaintiff's property had previously been assessed for this same purpose and the assessment paid. If this be meant to deny the right of the State to tax or assess property twice for the same purpose, we know of no provision in the Federal Constitution which forbids this or which forbids unequal taxation by the Constitution."

The Supreme Court of the State of Minnesota has held that the *same thing* may be taxed twice indirectly, as for example, the land and a real estate mortgage on such land.

State v. Jones, 24 *Minn.* 251.

State v. Rand, 39 *Minn.* 502.

Plaintiffs in error admit in their complaint (Tr. of Record, Pages 42, 43, Folio 135) that a membership in the Minneapolis Chamber of Commerce had an actual and substantial value of $678.61 in excess of its pro rata share of the corporation's tangible property taxed to the corporation. This is equivalent to saying that if such membership is taxable it should have been assessed at $678.61 instead of $3,500. The over-valuation of an item of property by the Assessor cannot of itself raise any Federal question. Grievances of this kind are for redress before the Assessor, or the City Board of Review, or the County Board of Equalization, or the

Minnesota Tax Commission, or the State Courts in the statutory proceedings heretofore mentioned. All of these tribunals allow ample opportunity and furnish due process of law.

Some Sections of the Minnesota Statutes not heretofore quoted are as follows:

SECTION 835, REVISED LAWS OF MINNESOTA FOR 1905 AS AMENDED BY CHAPTER 266, LAWS 1909.

The Minnesota Tax Commission shall prepare suittable forms for the listing of personal property each year.

It may arrange and classify the items of such property in such groups and classes, and from time to time change and separate or consolidate the same as it may deem advisable for securing more accurate information concerning and the more perfect listing and valuation of such property.

The assessor shall determine and fix the true and full value of all items of personal property included in any such list and enter the same opposite such items respectively, and the same shall be assessed for purposes of taxation according to law, so that when completed such statement shall truly and distinctly set forth the full and true value and also the assessed valuation for taxation of such personal property as required by law.

All acts and parts of acts in so far as they are inconsistent with this act are hereby repealed.

SECTION 2344, GENERAL STATUTES OF MINNESOTA 1913.

The said Minnesota Tax Commission shall have and exercise all the rights, powers and authority by law vested in the state board of equalization, which said board of equalization is hereby continued, with full power and authority to review, modify and revise, all of the acts and proceedings of said commission in so far as they relate to the equlization and valuation of property assessed for taxation, as prescribed by Section 863, Revised Laws of 1905 (2045), which state board of equalization shall meet on the second Tuesday in September of each year during its existence. The said Minnesota Tax Commission shall also have the following powers and duties:

* * * * *

(5) To raise or lower the assessed valuation of any real or personal property, including the power to raise or lower the assessed valuation of the real or personal property of any individual, co-partnership, company, association or corporation; provided, that before any such assessment against the property of any individual, co-partnership, company, association or corporation is so raised, notice of the intention of the commission to raise such assessed valuation and of the time and place at which a hearing thereon will be held shall be given to such person by mail addressed to him at his place of residence as the same appears upon the assessment book, at least five days before the day of such hearing.

Paragraph 9 of the Complaint of the Plaintiffs in Error (Tr. of Record, Page 43, Folio 137) alleges a previous appeal to the City Board of Equalization and the Minnesota Tax Commission, but it will be noted that the request to such tribunals was for the *cancellation* of the assessment and not for a reduction of the assessed valuation.

The fact that the year 1912 was the first year when such memberships were assessed in this county is doubtless the reason for some uncertainty as to their taxable value. Whether they ever had a taxable value prior to this year does not appear in the Record. Even if they had such taxable value in previous years, the failure to include them is nothing of which these plaintiffs in error can complain. The failure to assess property for a series of years does not entitle the owner thereof to exemption from taxation thereafter. See—

State v. Northwestern Telephone Co., 107 *Minn.* 390, 401.

Therefore, from no possible angle can the assessing of a membership at $3,500, when the complainants claim that by deducting the pro rata proportion of the taxed property of the corporation the shares of stock would have an excess value of only $678.61, present any Federal question for this court.

E.

The residence of plaintiffs in error outside the taxing district or the State does not of itself show that in this action there has been any depriving of such party of a Federal right.

This presents merely the question of the taxable situs of the membership. The records show that rights under such membership are exercised by the member only at the Chamber of Commerce in Minneapolis. The membership may well be deemed to have a taxable situs there. That is the business situs of this intangible personal property. The determination of the situs of the property is one exclusively for the State courts and the decision presents no Federal question.

Columbus Southern Railway v. Wright, 151 *U. S.* 470, 481-3.

In *Gallup v. Schmidt*, 183 *U. S.* 300, 305, it was held that the construction by the State courts of a statute in which a plaintiff was held to be an "official" resident of the State, whether novel or unsupported by authority, was a construction or application of the statute to the case in hand, and was binding on this court. See also—

New York Central Railroad v. Miller, 202 *U. S.* 584.

In *Metropolitan Life Insurance Company v. New Orleans*, 205 *U. S.* 395, it was stated that personal property may be taxed at its permanent abiding place or business situs no matter where its owner lives nor

where the paper evidences of such property may be at the time the property itself is taxed.

In *Corry v. Baltimore*, 196 *U. S.* 466, it was held that where it is valid under the laws of the State to tax shares of stock at the place of business of the corporation, such regulation does not deprive the stockholder of his property without due process of law even if he is a nonresident.

In *Savings Society v. Multnomah County*, 169 *U. S.* 421, 428, this Court held that the taxing by Oregon of mortgages on lands in that state, as applied to mortgages owned by citizens of other states, did not contravene the provisions of the Constitution of the United States.

If the plaintiff in error residing in Minnesota but outside the county of Hennepin was being assessed in his home county as well as in Hennepin County for this membership (but there is no allegation that he was being twice assessed) he had the right under the Minnesota Statutes to apply to the Minnesota Tax Commission to determine the proper county for assessment purposes. The statute providing for this procedure is as follows:

CHAPTER 834, REVISED LAWS OF MINNESOTA FOR 1905. AS AMENDED BY CHAPTER 223, LAWS 1911.

In case of doubt as to the proper place of listing personal property or where it cannot be listed as in this chapter provided, if between places in the same county, the place for listing and assessing shall be determined by the county board of equalization; and if between different counties, or places in different counties, by the Minnesota Tax Commission; and when determined in either case shall be as binding as if fixed hereby.

The State Supreme Court has fairly and finally decided the taxability of these memberships. The opinion in that court fully states the reasons and authorities therefor and it is unnecessary to discuss or elaborate them here. The opinion speaks for itself and is binding in this court on that question.

Defendants in error therefore re-assert that plaintiffs in error had an adequate remedy at law for all their grievances and, aside from that, stated no cause of action for equitable relief,—and above all, have no Federal question in this case.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 104.

GEORGE D. ROGERS, FRANK E. CRANDALL, AND ALFRED L. GOETZMAN, EACH AS REPRESENTING HIMSELF AND OTHERS SIMILARLY SITUATED, PLAINTIFFS IN ERROR,

vs.

THE COUNTY OF HENNEPIN, HENRY C. HANKE, AS COUNTY TREASURER AND INDIVIDUALLY, AND AL. P. ERICKSON, AS COUNTY AUDITOR AND INDIVIDUALLY, DEFENDANTS IN ERROR.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

H. V. MERCER,
Counsel for Plaintiffs in Error.

500 SECURITY BUILDING, MINNEAPOLIS, MINN.

(24,111)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 104.

GEORGE D. ROGERS, A. L. GOETZMAN, AND F. E. CRANDALL, REPRESENTING THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS IN ERROR,

vs.

THE COUNTY OF HENNEPIN ET AL., DEFENDANTS IN ERROR.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

Statement of Facts.

In correction of implications made in counsel's statement, permit us to suggest:

1. The statement of facts of defendants in error says that the argument on the demurrer in the trial court was made before the statutory method of defense was due; but neglects to say that there has never before been any intimation or claim that it was decided for that reason.

2. That statement also suggests that the plaintiffs in error decided to rely upon that complaint and not plead over; but it ignores the fact that the order for judgment that overruled the demurrer gave no such privilege (Tr., p. 46). We pointed out in brief of plaintiffs in error, page 13, that this amounted to a final judgment. In view of the implied suggestion of counsel, the legal fact should be brought to the attention of this court that the trial court in Minnesota has the undoubted right to overrule a demurrer and not allow the privilege to replead.

Section 4156 of the Revised Laws of Minnesota, 1905, contains the following:

> "Upon the decision of a demurrer which appears to have been interposed in good faith, the court, in its discretion, may permit the party to plead over, or, if the demurrer be sustained, may allow an amendment upon proper terms."

3. It does not seem to us that counsel give to the facts alleged in the complaint and admitted by the demurrer that degree of liberality which is due even from the most controversial attitude, as to the facts of inequality especially. See Brief of Defendants in Error, pages 50-54.

4. Nor is it quite in accord with the rule of rehearing in Minnesota to suggest on page 15 that a motion for rehearing was not had as a possible obstacle.

The facts as to the legal practice of the State there are: *Counsel first seek to intimate that it was our duty to ask for a rehearing.* They then point out authorities to show that we would have to be able to show to that court that it had fallen into manifest error or overlooked important facts. Counsel might have added that immediately following the language quoted on page 15 of this brief from Derby *vs.* Gallup, 5 Minn., 119, the court continues:

> "But where a question of law has once been fully discussed on the argument, and considered by the

> court, we cannot admit that a party is entitled to a reargument, on the ground that there is manifest error in the decision. We are not aware that any court has sanctioned such a practice, and it would be attended with inconveniences and evils far overbalancing the advantage accruing in the particular instance."

In the light of this language, followed to this date, as shown by the language of the court in Kelly *vs.* Liverpool & London & Globe Ins. Co., 102 Minn., 178-185, as follows:

> "In denying the defendant's application for a rehearing in this action, we take occasion, in view of the fact that the one before us does not conform therewith, to again call attention to the rule on the subject of petitions for rehearing, first laid down in Derby *vs.* Gallup, 5 Minn., 85 (119), referred to in 46 Minn., 54, 60; 48 N. W., 681, and reaffirmed in 87 Minn., 448; 92 N. W., 934, and to say, by way of addition to the rule, that hereafter applications which do not conform thereto, or which are frivolous or contain impertinent matter, will not be received or considered."

It is needless to say that we do not in the slightest mean to say that the court is wrong in that rule; but to call attention to the plain fact that the court deliberately rendered its decision in this case after full argument and briefs in which it considered all the points, and it had so pointed out to us in its own language in the Duluth case, which says (Tr., p. 16, f. 79):

> "We do not sustain the claims that the taxation of memberships in a board of trade or stock exchange, would violate provisions of the Federal or State constitution. It is argued that such taxation would be class legislation, and violate the equality clause in the Minnesota constitution, because the privileges enjoyed by members of social clubs, commercial clubs, golf clubs, secret and church societies, are not subject to taxation. We see no improper

classification here, nor any lack or equality or uniformity. Nor would it be double taxation. The members of the board are not required to pay taxes on the physical and tangible property of the board, nor does the board pay taxes upon the intangible rights which constitute the value of a membership.

"And we hold that proceedings to tax such a membership do not deprive the member of his property without due process of law, take property for public use without just compensation, or deny such member the equal protection of the laws, in violation of familiar provisions of the Federal constitution and amendments.

"Our conclusion, after a careful consideration of the arguments and briefs in this case and in the case of Rogers *vs.* County of Hennepin, the decision in which is filed herewith, is that the trial court properly rendered judgment against defendant for the tax assessed against his membership in the Duluth Board of Trade."

And to its language in this case, which says (Tr., p. 9, f. 66):

"Per CURIAM:

"This action was brought to cancel all assessments of taxes on memberships in the Minneapolis Chamber of Commerce, and to restrain their enforcement. The trial court sustained a demurrer to the complaint, and denied a temporary injunction. A motion by defendants for judgment was granted and judgment was entered in favor of defendants. Plaintiffs appealed from this judgment.

"The case was submitted on briefs in this court with State *vs.* McPhail. The decision in that case, filed herewith, controls this.

"Judgment affirmed."

There was nothing new to present. Our case had been argued to the best of our ability and the court did not desire to follow our line of reasoning. The stipulation in the record, Transcript, page —, folio —, allows the assignment of

errors and statement of facts in the State court as a part of this record to be printed, and they are returned (Tr., pp. 3-8). Petitions for reargument are a big enough nuisance, and their unnecessary nullification is not to be desired.

But we understand counsel to really agree with us that the petition for reargument under this case was not a necessity or a right, because the presumption is that the court considered these matters. Counsel admit:

> "But it will not be presumed that the court overlooked any essential facts or any applicable provision of law."

5. Nor is the suggestion of judgments that, in effect, foreclose all rights of litigants by decisions that evade the main issues in accordance with the public policy of the State.

6. Nor is there any force in fact to the implied suggestion that this case was to be submitted on the Duluth case.

Counsel requested, and we granted, a stipulation allowing them to print in their brief the stipulation by which this case was argued at the same time as the Duluth case. From the recital in that stipulation the Duluth case "* * * involves the principal question as to the general taxability of memberships of the kind in question." Both cases did involve the question as to whether the statutory defaulting of personal property covered such conditional interests.

That stipulation does not say that the specific taxability in this case, or the same kind of taxability; but does recite that this was the only way we could get our case heard before the end of the year (that being necessary to prevent spreading of the taxes).

Now, we have entered a stipulation in this case and in case 411 to allow them to be argued together in the time of one case and at the same time; but we have not suspected that the court would ignore the distinctions in the records or the points in the briefs because of that stipulation.

We have often argued two or more cases together where

there is a point of general facts somewhat similar in some things and controlled in part by the same rules of law. We had supposed that the minds of judges retained the experience at the bar which enables them in the course of an investigation of a general subject to have the full light upon that subject and to decide all questions relating thereto at one time, if specifically pointed out by briefs and argument, than to go into one phase one month and make a decision which must be revised when a new phase is reached the next month.

The stipulation after the recitals shows that neither party hereto was willing to argue this case on the Duluth case or to submit it on that case. We argued our case with it and the defendant relied upon the Duluth argument and its own brief.

The condition upon which the cases were argued together was that membership in such associations was not property as defined by the statute, and that the taxation was in violation of the Federal questions urged. Our stipulation reserved the right of oral argument as to our case. See counsel's brief, pages 13-14, and the defendants agreed to submit theirs on the special argument in the Duluth case, their own brief in this case.

Explanation.

We cannot stop to enter into much detail, because the learned counsel, without our objection, were a little late with their briefs, and we were called here on Friday instead of Monday, as had been expected. The result was that we got the galley proof in this case on Tuesday and in 411 on Wednesday; a sudden rush for the train made it impossible to get all our data till Saturday.

We hope therefore that this explanation will prevent any contentions of counsel from being taken as conceded in opposition to our original position in either case.

ARGUMENT.

I.

In spite of counsel's argument, pages 5-11, we claim that our contention of want of statutory authority, as pointed out in our brief, pages 23-43, remains unshaken.

Counsel suggest that we concede that a membership is property by the assignment that property was being taken without due process of law. Not at all; the contention is that the property is conditional, and that if money were collected as a tax it would be absolute property; but the question of whether these memberships are "money and credits" with a statutory basis for taxation as such is more surely the point here.

We fear we have not been plain in the expression of our views. We have not contended, and do not now contend, that the construction of State statutes, upon ordinary questions, is not for the State court where "Federal questions" are not involved; we find no quarrel with such cases as cited in counsel's brief, pages 5-11; but we contend that they are inapplicable because they were cases where there is no statute or where there has been no construction of a statute, and it is plain that none could be made to support the decision—arbitrary action enters about this stage.

We do not contend that such cases as Winona & St. Peter Land Co., 159 U. S., 526, or U. S. Express Co. *vs.* Minn., 223 U. S., 335, are erroneous; but that they are inapplicable here.

We have not contended that such conditional interests could not be taxed by proper statutory authority to define them as taxable, and to provide a proper method of listing and valuation to fix the amount of tax so that it may be rightfully proportioned between the individual subjects of

taxation throughout the district (Brief of Plaintiff in Error, p. 31).

Neither the Winona case nor the U. S. Express Co. case, *supra,* in any way conflict with our contention that the essential elements of statutory authority here do not exist and by no means of construction can be, or have been, made to exist.

Ibid.

We do not view the case of Fayerweather *vs.* Rilat, 195 U. S., 276 (Law Ed., 193), as counsel do, as to its effect on the case at bar.

In the Federal court it was alleged, in that case, that the State court had failed to adjudge whether certain releases were valid because of fraud where their validity was an essential issue and evidence tending to prove the invalidity was introduced. The defendant filed pleas of *res adjudicata* based upon the State decision. Those pleas were accompanied by an answer denying the allegations of fraud; the circuit court sustained the pleas and dismissed the bill and cross-bill and the plaintiff appealed to this court. (See statement preceding the opinion.)

If we understand the decision of *this court* properly, it is based upon the theory that the State court had considered the evidence upon that issue and decided that the issue was not supported, and that therefore the court had made a finding based upon a question of fact rather than law, but tested the question by the rule given in the quotation (Brief of Plaintiffs in Error, p. 28).

Now, it is perfectly plain that the facts did not have to be, and could not be, decided for this case to conform to the facts in the Duluth case.

Certainly it is not due process of law to take a case dependent upon one class of assessment involving different principles and decide that case upon its facts, and then take a case which might have one common rule of law applicable as to whether the two sorts of interests were property at all

and then decide that one could be assessed as general personal property, and that the other should be controlled by that decision, when the facts admittedly (and, as claimed, wrongfully) put the second assessment under another statute, where it could not possibly belong.

We do not contend that a court's conclusion must always be reasoned out in detail; but we do contend that parties have the right to have the admittedly material facts tested by clear and undisputed principles of law, within the rule laid down by this court in the authorities collected in the Fayerweather case and the quotations on page 28 of our original brief.

If, as we contend, the effect of this decision is found by this court to be to tax us without any judicial determination of the plaintiffs' rights on the application of the admitted and controlling facts, and without measuring the legal liability by the State law, which would have defeated the decision the case comes squarely within the principle as stated by Mr. Justice Brewer in the Fayerweather case, *supra:*

> "Although these plaintiffs were parties to the proceedings in the State courts, and presented their claim of right, if it be true that the necessary result of the course of procedure in those courts was a denial of their rights—a taking away and depriving them of their property without any judicial determination of the fact upon which such deprivation could be justified—a case is presented coming directly within the decision in 166 U. S., 226."

Federal questions, therefore, are involved in this record.

The rules of interpretation for such purposes are given in brief of plaintiffs in error, pages 25-29.

There are the following Federal questions:

First. Whether there is such statutory authority to tax these memberships as "money and credits" as makes due

process of law, as here applied (Brief of Plaintiffs in Error, pages 23-48).

Second. Whether it was due process of law to tax those outside of the county of Hennepin and those outside of the State of Minnesota (Brief of Plaintiffs in Error, pages 48-50).

Third. Whether, as here applied, there was not an assessment which was both without statutory basis and prejudicially discriminatory as between these members and all others of a similar class, and as between a double assessment of their assets and a single assessment of the assets of all other corporations, which amounted to a denial of both due process and equal protection, contrary to the Fourteenth Amendment (Brief of Plaintiffs in Error, pages 23-50, 50-70).

II.

The Per Curiam Opinion.

We have already pointed out in our correction of counsel's "statement":

a. The statute requiring the decision, which should have been filed. Of course, courts have liberty in their method of decision. They ought to have; they must have—they are the best judges of that degree of necessary expression to keep their decisions in line with systematic jurisprudence; but litigants ought to have; they must have—for the protection of their constitutional rights—the application of the essential law to their admitted facts, else law and facts both become immaterial factors in individual litigation.

If the only material statute is to be ignored in a statutory proceeding, then the common law and the constitutions can likewise be ignored.

If the material and undisputed facts of assessment and

discrimination are to be ignored, then evidence becomes immaterial.

If both evidence and law are to be ignored, then trials become futile, the judiciary would become *absolutely useless* and the pillars of government crumble from their foundation.

The inevitable fact remains that here is a "money and credit" tax placed upon "memberships" that are not "money and credits;" no power to list or assess their value is given and no method of taking out the value corresponding to the property previously taxed is allowed or attempted. Whether this is a lawful tax is not mentioned. Chapter 5 of the Revised Laws of Minnesota, 1913, relates to the "Judicial Department," and under the sub-title of "Supreme Court" we find section 123. This was section 74 in the Revised Laws of 1905.

> "Decisions—Headnotes—Copies. In all cases decided by the court, it shall give its decision in writing, and file the same with the clerk, together with headnotes, briefly stating the points decided. A copy of such headnotes shall be furnished by the clerk, without charge, to such proprietors of daily newspapers as may desire them for free publication. Decisions may be rendered and judgments entered thereon in vacation as well as in term."

It is difficult to understand how more can be said for this decision than that it affirmed the lower court in such way as to cut out these points by treating them as decided, but without giving effect to them.

In other words, if our conception of this decision be correct, it was made in absolute disregard of the plaintiffs' right to have the State law and the Fourteenth Amendment applied to protect them against the assessment, while in reality the ultimate decision was against them. We suggested in our Original Brief, pages — — that we do not make this claim upon mere legal errors; but upon the theory that with-

out the application of principles of law and fact not disputed by that court these plaintiffs are deprived of the benefits which that application would inevitably have made. In *Scott vs. McNeal* (154 U. S., 34) (L. Ed., 896) this court said:

> "Upon a writ of error to review the judgment of the highest court of a State upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the Territory, or of the State, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another State. In every such case, this court must decide for itself the true construction of the statute. Huntington *vs.* Attrill, 146 U. S., 657, 683, 684; Mobile & Ohio R. R. *vs.* Tennessee, 153 U. S., 486, 492-495."

What construction is there which could be given that would hold the tax here permissible, in view of the decision in the Duluth case that the memberships of that institution (*McPhail vs. Duluth Board of Trade, Minn.*) should be assessed upon a different plan and under a different system, and the decision here that these were the same? If they were similar they had their right to the same sort of tax based upon the same sort of listing and value. If dissimilar, as the facts show, then were they sufficiently in the same class that a decision of the Duluth Board should control these?

How shall the assessors assess in the future, if at all?

Shall they assess these memberships as "money and credits" and disregard the tax already paid on the assets by the corporation, or shall they go to the Duluth plan and deduct the assets?

Shall they assess these and not the Associated Press mem-

berships, even though of the same class and of much more contingent value?

Or shall they adopt a middle ground and assess part only on the theory of Duluth and partially as a double assessment on the assets already taxed and thus discriminate as against all corporations of all classes? Shall they list? Where? Shall they value? By what method? Shall they have the right to have the courts determine these doubtful questions, or shall they be denied that right in absolute disregard of the claims, on admitted facts, both as to State law and the Fourteenth Amendment?

b. The decisions of the Minnesota court to the effect that it does not care to be taking the public's time to correct mere errors of law upon which it has passed its judgment, and that it would ignore petitions in violation of the rule, and its language in both this case and the Duluth case that it had considered the briefs and arguments in both cases, together with counsel's admission (page 16) that want of consideration of either the facts or law was not to be attributed to it. From the standpoint, therefore, of that court, we had no further steps to take.

The record shows, pages 3-8, errors 1-14 the fact that this was a money and credit tax; that there was no authority for it; that it lacked due process of law in the assessment, and that it lacked equal legal protection in the discriminatory assessment, all claimed to be in violation of Federal rights under the Fourteenth Amendment.

It was our duty to treat the court's statement of careful consideration with respect; to take our remedy by writ of error and trust in a higher court.

This must of necessity be the correct attitude to protect courts against the annoyance of whimsical appeals for reconsideration of defeated counsel who have advocated themselves into self-satisfying, but erroneously previous, conclusions of ambitious results.

III.

The Complaint Sufficient as to Inequality and the Case was Decided in Equity.

Counsel suggest on page 19 of their brief, the want of inequality and adequate legal remedy; they suggest that we did not replead. We had pointed out in our brief that the power to amend was not given us. (See Tr., p. 46).

Counsel then argue, pages 20-31:

a. That there was an adequate remedy at law which could have been used on the demurrer.

Our answer is:

1. *The question of whether the legal was the adequate remedy was for the State court, and is not now to be considered.*

The judgment in the lower court (Tr., p. 47 of 144, 145) was upon the merits, and not upon the ground of want of equitable remedy. The opinions of the two cases show that no such idea as counsel argue was in the mind of the court.

Disregarding what seems to us the inconsistency of counsel in their — subdivision that these issues were decided, and their contention under subdivision — that possibly it does not affirmatively approve that this case was decided on the merits, we call attention to the following cases:

In *Carlin vs. Brackett* (38 Minn., 307) it is said:

> "This judgment was upon the merits of the action as presented by the complaint and admitted by the demurrer, and is as effectual as if there had been a verdict upon the same facts, for they are established by way of record in either case. And when once established, the litigation, as between the same parties and those in privity, is at an end. To avoid the effect of a demurrer as a confession of the facts set forth in the pleading, the party against whom the ruling is made must either amend or take issue."

In *Dohs vs. Holbert* (103 Minn., 283) it is said:

> "The receiver was appointed at the instance of this appellant. The actions were brought for his benefit, for the purpose of having the transfers of the policies, and of the particular policy in question, set aside and the proceeds thereof applied to the payment of the appellant's judgment. The court, after a full hearing, determined the issue in favor of the defendant. The order sustaining the demurrer in the first action was upon the merits. Day *vs.* Mountin, 89 Minn., 297; 94 N. W., 887; Carlin *vs.* Brackett, 38 Minn., 307; 37 N. W., 342. In the second action the court determined that the matter was *res adjudicata*. The appellant was privy to the actions of Straight, who prosecuted the actions on his behalf (Dunham *vs.* Byrnes, 36 Minn., 108; 30 N. W., 402), and is therefore bound by the judgments rendered therein to the effect that the assignment of the policy was not a fraud upon the creditors of Holbert and was not a transfer of non-exempt property."

In *Northern Pacific Railway vs. Slaght* (205 U. S., 122 it is said—the record is plain that no privilege of repleading was given here (Tr., p. 46, f. 142):

> "It is well established that a judgment on demurrer is as conclusive as one rendered upon proof. Gould *vs.* Evansville & Crawfordsville R. R. Co., 91 U. S., 526; Bissel *vs.* Spring Valley Township, 124 U. S., 228; Freeman on Judgments, section 267. The question as to such judgment when pleaded in bar of another action will be necessarily its legal identity with such action. The general rule of the extent of the bar is not only what was pleaded or litigated, but what could have been pleaded or litigated. There is a difference between the effect of a judgment as a bar against the prosecution of a second action for the same claim or demand, and its effect as an estoppel in another action between the same parties upon another claim or demand. Cromwell *vs.* County of Sac, 94 U. S., 351; Bissel *vs.* Spring Valley Township, 124 U. S., 225; New Orleans *vs.* Citizens Bank, 167 U. S., 371; Southern Pacific Railroad Company *vs.*

> United States, 168 U. S., 1; Gunter *vs.* Atlantic Coast Line, 200 U. S., 273; Deposit Bank *vs.* Frankfort, 191 U. S., 499, and a distinction between personal actions and real actions is useful to observe."

All of the facts were admitted by demurrer and all the questions raised in the State court. There was no dismissal, but a decision that plaintiffs were not entitled to recover on the merits.

The test is as to whether that would make *res adjudicata* in Minnesota.

Of this there can be do doubt.

Undoubtedly there must ordinarily be grounds for equitable relief in an injunction in advance, rather than a defense after default is sought. The case of *Northern Pacific Railroad vs. Patterson* (154 U. S., 134) (L. Ed., 934), cited by counsel and coming from Montana, was on demurrer, but the Montana court decided that there was no remedy in equity because there was an adequate legal remedy. This court said:

> "But it was for the Supreme Court of Montana to determine whether the statute was exclusive and whether plaintiff came within its terms or not, and its action in that regard raises no Federal question for our consideration."

The Minnesota court made no such decision, but undertook to decide this case on the merits. So it was for that court to decide whether it was a proper case for equitable interference if counsel had desired to have raised it in that court; but counsel suggest that these plaintiffs can still defend. That is for the State court again in the first instance, but having once attempted to decide the merits upon the theory that it could be tried in equity and at the request of the members that court would undoubtedly say, as this court said:

"In Perego *vs.* Dodge, 163 U. S., 160; L. Ed., 116:

" 'Plaintiff, having voluntarily invoked the equity jurisdiction of the court, was not in a position to urge, on appeal, that his complaint should have been dismissed because of adequacy of remedy at law. Even a defendant, who answers and submits to the jurisdiction of the court, and enters into his defense at large, is precluded from raising such an objection on appeal for the first time. Reyes *vs.* Dumont, 130 U. S., 354, 395 (32: 934, 946); Kilbourn *vs.* Sunderland, 130 U. S., 505 (32: 1005); Brown *vs.* Lake Superior Iron Co., 134 U. S., 530, 536 (33: 1021, 1025).'

"In Highland Boy Gold Mining Co. *vs.* Strickley, 116 Fed., 852-6, where Judge Sanborn said, at pages 854-5:

" 'If the pleadings in this action had been carefully examined at the opening of the trial, a grave doubt might have arisen whether this was an action at law or a suit in equity. But the subsequent proceedings of the parties have settled that question. One who consents to the hearing in equity of a legal cause of action, or to the trial of an equitable cause of action at law, is thereby estopped from successfully objecting for the first time in an appellate court to the method of trial which he adopted.' "

It may be improper—we are not sure—to quote from our brief (pp. 12-13) in the Supreme Court of Minnesota. That brief, like those of other cases, is kept in the State Library in Minnesota and in the Minneapolis Bar Association Library, and perhaps one or two others. It is not a part of this record and we do not quote it as such. It says:

"*Multiplicity of Suits and Defenses Avoided.*

"For ready reference to get at the merits we suggest that it sufficiently appears from the complaint and the demurrer that this action avoids a multiplicity upon the identical questions, and this is found true by the judgment, that gives a court of

> equity jurisdiction to clear up the whole thing, as we all desire. Scribner *vs.* Allen, 12 Minn., 85 (148); Cone *vs.* Wold, 85 Minn., 302-6. Under the statute, Revised Laws of 1905, sec. 4053, the right to make representative parties to determine the rights of numerous litigants is expressly given. So far as it related to suits in equity, this was the prior, and is the present, rule without a statute, and all members will be bound by the judgment. This was and is the sensible, as well as the equitable and amicable procedure here. Wallace *vs.* Adams, 204 U. S., 414. There is, too, another ground that would support the action in equity and that is that there is a systematic discrimination between the taxation of these memberships and those of other institutions, making a ground of equitable interference for cancellation. Atchison, etc., Ry. Co. *vs.* Sullivan, 173 Fed., 457, with cases cited at pages 469-471 (8 C. C. A.). This was, and is the sensible, as well as the equitable and amicable procedure here."

No objection was raised to that suggestion. Nobody wanted to try each separately. Besides, there was no provision in the laws of Minnesota for segregating these assessments from others, and unless the whole tax was paid there would be a penalty that would in many cases exceed this tax. The penalty for personal property being 10 per cent. Rev. Laws, 1905, sec. 888.

2. *Certainly the record does not show any prior objection to equitable procedure.*

This being true it is too late to change theories. That question is waived.

In all this case, to this time not even a suggestion of prematurity can be found in either the record or the opinion. No decision on procedure was made; everybody joined in trying to get a decision on the merits and without any suggestion of such theory as here intimated by counsel. It was

tried and decided upon the theory that the action was properly brought. It is therefore not now open to the learned counsel to change that theory.

In Virtue *vs.* Creamery Package Co., 227 U. S., 8 (L. Ed., 393), this court refused to allow the theory to be changed as to the contention in this court. It is true that that case was tried first in the Federal court and afterwards in the Circuit Court of Appeals; but the question of whether a case is triable at law or in equity has been so often raised and adversely decided for waiver after the case has been tried as in equity or at law, that the point is concluded.

In Highland Boy Gold Mining Co. *vs.* Stickley, 116 Fed., 852-6 (8 C. C. A.), Judge Sanborn said:

> "One who consents to the hearing in equity of a legal cause of action, or to the trial of an equitable cause of action at law, is thereby estopped from successfully objecting for the first time in an appellate court to the method of trial which he adopted."

In Ehmen *vs.* City of Gothenburg, Neb., 200 Fed., 564 (8 C. C. A.), Judge Hook said:

> "It is too late to raise the other questions now. It would be manifestly unjust, when a case has been narrowed to an issue by pleadings and trial, and a bill of exceptions submitted and allowed to present the ruling of the trial court, for an appellate court to entertain a new and different question on the merits."

In Reynes *vs.* Dumont, 130 U. S., 354 (L. Ed., 934), Mr. Chief Justice Fuller said for this court:

> "Nor can the objection be sustained that there was an absence of jurisdiction in equity because of the adequacy of the remedy at law."

And

> "The rule as stated in Daniell's Chancery Practice (vol. 1, p. 555, 4th Am. edition) is that if the objec-

> tion of want of jurisdiction in equity is not taken in proper time, namely, before the defendant enters into his defense at large, the court, having the general jurisdiction, will exercise it; and in a note on page 550, many cases are cited to establish that 'If a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law. This objection should be taken at the earliest opportunity. The above rule must be taken with the qualification that it is competent for the court to grant the relief sought, and that it has jurisdiction of the subject-matter.' "

After citing and quoting from cases it is said:

> "The doctrine of these and similar cases is, that the court, for its own protection, may prevent matters purely cognizable at law from being drawn into chancery, at the pleasure of the parties interested; but it by no means follows, where the subject-matter belongs to the class over which a court of equity has jurisdiction, and the objection that the complainant has an adequate remedy at law is not made until the hearing in the appellate tribunal, that the latter can exercise no discretion in the disposition of such objection. Under the circumstances of this case, it comes altogether too late even though, if taken *in limine*, it might have been worthy of attention."

As to cases where equitable actions have been maintained see Brief of Plaintiffs in Error, pages 56-66.

The question of whether this is a legal or equitable case is not the question upon which the Federal right is, or can be, claimed. This case must stand or fall outside of that. As said by *this court* in Scully *vs.* Bird, 209 U. S., 479 (L. Ed., 899):

> "* * * Whether the bill presented a case for equitable relief does not present a question of the jurisdiction of the court as a court of the United States."

Thus we see that the State court treated this as a proper form of action and rendered its decree on that theory. That was for the Minnesota court and not this court; it is only an afterthought in this case.

IV.

Counsel are Mistaken (Page 32) as to the Materiality of the Assessment.

Unable to find any statutory authority for taxing such memberships as "money and credits," or for listing or valuing them where so taxed, counsel claim, in effect, that if they had been otherwise assessed and valued the result would have been against the plaintiffs. How do they know?

We pointed out in our brief herein that such memberships are not taxable within the specific statutory definition as declared by the Minnesota court in the McPhail case (Tr., pp. 13-15).

Also, Original Brief, pp. 39-43, that there is no way of listing or valuing them as money or credits. And further, that there is no method provided for listing or valuing them under any theory of assessment (Original Brief, pp. 35-43).

Now the argument of counsel amounts to this: If there were legislative authority to tax, to list and to value, and if that listing and that valuation should provide for so arriving at the contingent value of these memberships as to leave enough, after deducting the value of the assets upon which the corporation pays, then possibly there might be enough left to make as much taxes if assessed at a higher rate. Do counsel think for a moment this would be due process of law? Have these parties had any right to be heard upon whether any assessment upon some other theory is valid?

In other words, their claim is that if these memberships could not be taxed as "money and credits," relief should be denied upon the theory that a new listing, a new valuation, and a new theory might make a new taxation which

would be as large. Defenses of the parties to such new theory; the right to be taxed according to a statutory rule—where nobody can find the rule—are supposed to overcome any right to relief. We understand this contention to be in direct conflict with the rule of the Minnesota Supreme Court upon these statutes.

State *vs.* Nelson, 107 Minn., 319.

We understand it to violate the principle which upset the Georgia system in this court, for the court itself would not assume a valid and conclusive taxation upon a different theory when none in fact had been made.

Central of Georgia Ry. Co. *vs.* Wright, 207 U. S., 52 (L. Ed., 51).

We practically defied counsel to point to any method of listing and assessing that covers these memberships (Original Brief, p. 25). We are unable to find in their brief or any statute any place where a listing or valuation can be found to meet the sort of memberships here in question for the very simple reason that there exists no such authority.

Counsel suggest that the State policy of "money and credits" is admirable.

State *ex Rel.* Winona Motor Co. *vs.* Minn. Tax Comr., 117 Minn., 159.

Travelers Ins. Co. *vs.* Comr., 185 Minn., 364-8.

We have no quarrel with such statutory policy for "money and credits;" probably it works well within the realm of bringing out hidden money and credits, but does not enable the taxing officers to disregard the statutory definition and use it as a drag net to enforce the payment of taxes on corporations in the nature of voluntary associations, because the legislature and the people have made no other provision for their taxation.

No attempt is made by counsel to justify the tax as such, as we view their brief.

V.

Double Taxation was Prejudicial.

The statement of counsel as to the facts alleged in this regard (Brief of Defendants in Error, pp. 36-37) is not complete as evidenced by Brief of Plaintiffs in Error, pp. 50-54. Also the complaint, Tr., pp. 41-45.

By thus narrowing one particular allegation counsel seek to have it concluded that it is but argumentative, and therefore not admitted by the demurrer, because it is an allegation of law, and that it shows no particular amount of property escaping taxation, and that the excess of our taxes would be all the injury anyway (Brief of Defendants in Error, pp. 36-37).

Let us turn to the complaint and see what is really alleged, and then consider that so far as it has allegations of fact they are admitted and must be treated as if found by the court.

We then have a case where the findings are not disputed and we can see what of them are of fact and whether any are of law or of mixed fact and law. Briefly put, then, we have the effect of findings as follows:

1. That the Chamber is a corporation in the nature of a voluntary association "similar in principle, organization, conduct, control, and relations among its members, to the relations of membership and control in churches, social clubs, fraternal societies, the Associated Press, and voluntary business associations generally."

Whether it was similar was a question of fact.

The word similar as defined by 36 Cyc., 457, is:

> "Exactly corresponding, resembling in all respects; precisely like; nearly corresponding; resembling in many respects; somewhat like; having a general likeness; homogeneous; uniform."
>
> See Outza *vs.* Cortes, 136 U. S., 530 (L. Ed., 464).
>
> U. S. *vs.* Morton, 65 Fed., 204-8 (7 C. C. A.).

We take it to mean like, but not exactly identical. In Greenleaf *vs.* Goodrich, 101 U. S., 278-283 (L. Ed., 845), this court had under consideration a revenue act respecting enumerated classes of goods and "goods of similar description." Through Mr. Justice Strong it said:

> "The statute does not contemplate that goods classed under the words 'of similar description' shall be in all respects the same. If it did, these words would be unnecessary. They were intended to embrace goods like, but not identical with, delaines."

This court discusses that case upon the theory that the question of "similarity" was one of fact, saying:

> "Nor was there any evidence that there was any goods known by merchants, or in commerce as goods of a similar description with delaines."

It sustained a charge to the jury containing the following:

> "If substantially the same article, then the duties were properly assessed; but if they were substantially different, and the plaintiffs' goods were not of a similar description to the delaine fabrics, then they were not subject to the additional duty.
>
> "Notwithstanding the strenuous objections urged against such a submission to the jury, we think it was correct. At least it was quite as favorable to the plaintiffs as they had a right to demand."

2. The memberships only represent property as those of such other organizations do (Tr., p. 42, fol. 134).

3. The Chamber's property had already been completely taxed in the same county (Tr., p. 42, fol. 135).

> 4. " 'That if the total number of memberships had then been counted as representing the property of said corporation, and they had been of the value of $3,500.00 unqualifiedly, and the assessment made against the buildings and other property of said cor-

poration had been deducted on the basis of the value assessed, so as to have left the net equity in such memberships on the basis of the then contingent sale price, six hundred seventy-eight dollars and sixty-one cents ($678.61), would have been all that was left for property not otherwise taxed to said association, and the value of said sale price except in the last named above is based upon the assets already taxed; that said value was entirely a contingent one and conditioned upon the rules and regulations for acquisition, control and disposal, as above set forth, and did not represent property that could be acquired, controlled or disposed of except with the consent and subject to the regulations of said association outside of legal obligations' (Tr., p. 43, fol. 136)."

5. "'That there are five hundred and fifty (550) members of said association, similarly situated to this plaintiff, except that the names and residences of the owners of such membership, as they appeared upon May 1, 1912, as the date on which said assessment was made were as specified in the attached list, which is marked "Exhibit A" and hereby made a part hereof, and this action is brought on behalf of all of them, and they were each taxed by the taxing officials of the city of Minneapolis upon said memberships at the rate of thirty-five hundred dollars ($3500.00) apiece for the year 1912, under "moneys and credits," just as if the assets of the corporation had not been taxed and as if such memberships were property in the general sense; that the membership in the Associated Press, lodges, fraternal orders, churches, etc., were not taxed in said city, although standing in a similar position; and a discrimination was thereby made, not only unlawfully, but prejudicially as against this plaintiff and the other four hundred ninety-nine (499) members of said association by unequally assessing them and taking their property without due process of law, contrary to the State and Federal constitutions' (Tr., p. 43, fol. 137)."

The prejudice is specifically and unequally alleged because of the similarity. So the similarity was of fact. It was like the enumerated corporations in

Principle,
Organization,
Conduct,
Control,
Relations to its memberships.

The Supreme Court of Minnesota had so treated this particular institution in Evans *vs.* Chamber, 86 Minn., 448.

The Legislature and the Compilation Committee have so arranged it.

We have already pointed out in the brief of plaintiffs in error, pages 35-37, the statutory section in Minnesota which shows that double taxation upon the assets of other corporations is clearly and unmistakably provided against by the effect of the statute, and we have pointed out in this complaint and in our original brief on page 52 that these memberships were assessed at $3,500 apiece for the year 1912, as if the assets had not been taxed and that by no possible means could they have been figured out above the assets to exceed $668.71. To say that no prejudice exists in favor of these plaintiffs as against the other parties on these allegations is to say that it is not prejudicial for them to have paid taxes when other citizens do not pay upon a similar class of property, and to pay double taxation through this corporation when others do not pay double taxes in other corporations, and to clearly and discriminately violate the rule which this court laid down in the case of Raymond *vs.* City of Chicago, 207 U. S., 20 (— L. Ed., 78), wherein the opinion of the majority, expressed through Mr. Justice Peckham, refers to Louisville Trust Company *vs.* Stone, 107 Fed., 305 (6 C. C. A.), and then says:

> "In the last case, which related to enjoining the collection of alleged illegal taxes by reason of discrimination, the court said: 'It may be conceded that, if the allegations of the bill are made out, there exists,

in respect to the property of complainant and others similarly situated, a systematic, intentional, and illegal undervaluation of other property by the taxing officers of the State, which necessarily effects an unjust discrimination against the property of which the plaintiff is the owner, and a bill in equity will lie to restrain such illegal discrimination, and that in such cases Federal jurisdiction will arise because of the equal protection of the laws guaranteed by the 14th Amendment.'

"The same principle has been recognized in Reagan *vs.* Farmers' Loan & T. Co., 154 U. S., 362, 390; 38 L. Ed., 1014, 1021; 4 Inters. Com. Rep., 560; 14 Sup. Ct. Rep., 1047; A. Backus, Jr., & Sons *vs.* Fort Street Union Depot Co., 169 U. S., 557, 565; 42 L. Ed., 853, 857; 18 Sup. Ct. Rep., 445; Fargo *vs.* Hart, 193 U. S., 490; 502 L. Ed., 761, 766; 24 Sup. Ct. Rep., 498."

Raymond *vs.* Chicago U. T. Co., 207 U. S., 36.

It seems to us that the question of discrimination was otherwise sufficiently covered in our original argument except that counsel say that this is a matter of over-valuation. If it is, then we were entitled to relief which we did not get, but over-valuation would not have solved the problem alone. If these memberships were taxed upon any theory after reducing the amount already taxed, there would still be a discrimination if others of the same class were not taxed at all, and there is no authority for taxing the others at all (if our view of the law be correct) any more than there is these. There is no reduction that can be made, for the whole tax should be declared void.

If a reduction were possible, then the demurrer should not have been sustained because the plaintiff would have been entitled to some relief that could have been shown by the evidence upon this complaint. There is no question about this rule in Minnesota or any other place else so far as we have known. A general demurrer should not be sustained as against a cause of action which calls for any substantial

relief. It is the rule in Minnesota as expressed in Veneer *vs.* G. N. Ry., 117 Minn., 447, wherein the Chief Justice of the Minnesota court said:

> "The rule guiding the court in determining the sufficiency of a complaint, either in an action at law or suit in equity, when challenged by a general demurrer, is not to determine whether the plaintiff is entitled to all and singular the relief demanded or prayed for, but whether the allegations thereof, properly and liberally construed, entitle him in any measure to the relief demanded. If so, the demurrer will be overruled. 2 Dunnell, Minn. Digest, § 7549, and cases there cited."
>
> Venner *vs.* G. N. R., 117 Minn., 447 (at 454).

First National Bank *vs.* Ayers, 160 U. S., 660, cited on page 37 of their brief (L. Ed., 573), is not similar; the statute treated national and State banks upon an equality. There was no evidence of a discrimination. This court said:

> "As the record appears there is no fact of which the court can take judicial notice."

Not so here; the fact is alleged and if the defendants wanted to question the degree of prejudice as being less than complete, they could easily have tested the matter, but they were satisfied of the complete discrimination.

The Atchison, T. & S. Ry. Co. *vs.* Sullivan, 173 U. S., 456, cited by us in our Original Brief, pp. 58-9, allowed a reduction, but held to the taxability in part. The case was tried out there on the evidence. If the Supreme Court of Minnesota had held, or this court should hold, that there was any tax constitutionally taxed and should say that it should have been on $678 rather than $3,500 to avoid double taxation; or should say that the limit would be on $6788, and that the discrimination would be held prejudicial only to that extent, that would end the matter.

We do not see any intention in any of the cases cited at the top of page 38 of counsel's brief to limit the complaint

to a pleading of the evidence of the exact amount of prejudice. It seems to us that the cases cited on pages 56-66 of our Original Brief preclude any such necessity.

But, however this may be, the plaintiffs were entitled to some relief and it was wrong to sustain the demurrer. Declaring a decision or a taxation to be void, should be like declaring a statute void. It should be declared void as a whole unless defendants can show a division that can be made which will leave a part valid under a valid State law.

If every corporation were taxed upon its assets, and every stockholder or member were again taxed the situation might not be discriminatory, except as between them and persons having other classes of assets; but where these are so taxed and all others in their class not taxed, and all other corporations not doubly taxed on their assets, but carefully guarded by statute, the discrimination is plain. We hardly see how the cases cited by counsel at the bottom of page 38 of their brief maintain their proposition. It seems to us that the rule of this court is expressed in Travelers' Ins. Co. *vs.* Conn., 185 U. S., 361 (L. Ed., 949):

> "The single question presented for our consideration is whether this legislation of the State of Connecticut in respect to the taxation of the shares of stock in a local corporation held by nonresidents is in conflict with par. 1, of § 2 of article 4 of the Federal Constitution, or the 14th Amendment thereto. It is alleged that there is such discrimination between resident and nonresident stockholders, as works a denial of the equal protection of the laws, and to the prejudice of citizens of other States. The stock of the nonresident stockholder is assessed at its market value, without any deduction on account of real esate held by the corporation. The stock of the resident stockholder is assessed at its market value, less the proportionate value of all real estate held by the corporation upon which it has already paid a tax. As thus stated, there would appear to be a wrongful discrimination, and that the nonresident stockholder was subject to a larger burden of taxation than the

resident stockholder, and this, not as a result of the action of any mere ministerial officers in making assessments, but by reason of the direct command of the statute to include the real estate in the valuation in the one case and to exclude it in the other.

"But this apparent discrimination against the non-resident disappears when the system of taxation prevailing in Connecticut is considered." (See Brief of Plaintiffs in Error, pp. 56-66.)

VI.

Residence of Plaintiffs.

The question of residence is an admitted fact. The memberships were kept at the respective residences (Tr., p. 44, fol. 139). There is no finding of local situs; no decision of a legal situs—there is just a decision.

There is no room for doubt upon this record as to the place of assessment as between either different counties or different States. We therefore conclude that our brief was sound.

Respectfully submitted,

H. V. MERCER,
Counsel for Plaintiffs in Error.

DECEMBER 4, 1915.